

1 Merrill - Highly Confidential - Trade Secret

2 A F T E R N O O N S E S S I O N

3 1:41 p.m.

4
5 THE VIDEO OPERATOR: This is
6 videotape number 2, the continuation of the
7 deposition of Mr. Merrill. Today is June 29th,
8 1995, and the time on the screen is 1:41:17. You
9 are on the record.

10 D A V I D E R N E S T M E R R I L L,
11 resumed, having been previously duly sworn, was
12 examined and testified further as follows:

13 CONTINUED EXAMINATION

01:41:18 14 BY MR. KILLORY:

01:41:22 15 Q. Mr. Merrill, I would like to pick up
01:41:26 16 and continue with some discussion of the ART
01:41:28 17 process and the ART stems that we were talking
01:41:36 18 about this morning. When did you first become
01:41:42 19 aware of the alkaloid reduced tobacco project
01:41:44 20 which I take to be the ART project?

01:41:50 21 A. I don't remember the exact date.

01:41:54 22 Q. Do you know approximately?

01:41:58 23 A. Not really.

01:42:02 24 Q. Was it -- at what stage in the
01:42:04 25 project did you first become aware of it?

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01:42:08 2 A. The approximate date that I can give
01:42:12 3 you, they were already constructing the building,
01:42:16 4 and that would have been late 1989.

01:42:22 5 Q. And the building you're referring to
01:42:22 6 is the Bermuda Hundred facility; is that
01:42:22 7 correct?

01:42:22 8 A. That's correct.

01:42:28 9 Q. What was the context in which you
01:42:32 10 first became aware of the ART project?

01:42:44 11 A. The building was going up, and the
01:42:48 12 person I used to work for, Lewis Turano, was
01:42:48 13 responsible for the project.

01:42:52 14 Q. What's your understanding of what the
01:42:52 15 purpose of the ART project was?

01:42:54 16 MR. NUNLEY: Objection as to form.

01:43:02 17 A. The process was developed to remove
01:43:06 18 nicotine from cut filler.

01:43:12 19 Q. And the product of the ART stem
01:43:14 20 project, would those become known in Philip
01:43:16 21 Morris as De-Nic cigarettes?

01:43:20 22 A. I believe so, yes.

01:43:22 23 Q. Do you know why Philip Morris
01:43:26 24 undertook this project to take the nicotine out
01:43:32 25 of a cigarette brand?

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13:32

2 A. No. *I do Not*

01:43:36

3 Q. Do you know whether these De-Nic
4 cigarettes were sold?

01:43:38

01:43:46

5 A. They were in test market. But I
6 don't know if they were ever sold.

01:43:48

01:43:56

7 Q. What do you know about the test
8 marketing of the De-Nic cigarettes?

01:43:58

01:44:00

9 A. Nothing really.

01:44:02

10 Q. Have you ever had any conversations
11 on that subject with anybody?

01:44:04

01:44:04

12 A. No.

01:44:10

13 Q. Do you know under the denicotizing
14 project of -- strike that. Under the ART

14:22

01:44:24

15 process, do you know how the nicotine was taken
16 out of the tobacco?

01:44:26

01:44:28

17 A. Not really.

01:44:38

18 Q. Do you know whether the method used
19 differed from prior efforts to produce low
20 tar/nicotine cigarettes?

01:44:40

01:44:42

21 MR. NUNLEY: Objection. I don't know
22 that the record has established that there were
23 prior efforts to produce low tar/nicotine
24 cigarettes.

01:44:44

01:44:46

01:44:48

01:44:50

01:44:52

25 Q. Do you know whether low tar and

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14:56 2 nicotine cigarettes had been produced by Philip
01:44:58 3 Morris prior to 1989?
01:44:58 4 A. No.
01:45:02 5 Q. Do you know the method by which low
01:45:06 6 tar and nicotine cigarettes are produced?
01:45:08 7 A. Some.
01:45:12 8 Q. Does it involve the use of different
01:45:12 9 filters?
01:45:14 10 A. Yes.
01:45:20 11 Q. Does it involve taking nicotine out
01:45:22 12 of the tobacco itself?
01:45:22 13 A. No.
15:26 14 Q. Did the ART process as you understand
01:45:28 15 it involve taking the nicotine out of the tobacco
01:45:28 16 itself?
01:45:30 17 A. Yes.
01:45:42 18 Q. Do you know whether Philip Morris
01:45:44 19 today sells De-Nic cigarettes anywhere?
01:45:48 20 A. No, I do not.
01:46:14 21 Q. ART was known as the alkaloid reduced
01:46:18 22 tobacco program. Does "alkaloid" represent
01:46:20 23 nicotine? Do you understand that to mean
01:46:20 24 nicotine?
01:46:26 25 A. An alkaloid is a specific type of

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6 16:30 2 compound. So the term "alkaloid" covers many
01:46:32 3 compounds. Nicotine is just one of them.
01:46:34 4 Q. In tobacco, what are the other
01:46:36 5 alkaloids?
01:46:36 6 A. I have no idea.
01:46:40 7 Q. Is nicotine one of the alkaloids in
01:46:42 8 tobacco?
01:46:46 9 A. Yes, it is.
01:46:46 10 Q. Do you know what percentage of
01:46:50 11 overall alkaloids in tobacco is represented by
01:46:50 12 nicotine?
01:46:52 13 MR. NUNLEY: Objection as to form.
6 16:54 14 A. No, I don't.
01:46:58 15 Q. Any idea, ball park?
01:46:58 16 A. No.
01:47:06 17 Q. Are you aware of any testing done by
01:47:08 18 Philip Morris in which "alkaloid" and "nicotine"
01:47:10 19 are used interchangeably?
01:47:16 20 A. I don't know the answer to that
01:47:16 21 question.
01:47:38 22 Q. What was the use of stems in the ART
01:47:38 23 process?
01:47:44 24 MR. NUNLEY: Which stems, Ted?
01:47:46 25 MR. KILLORY: The ART stems we were

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01:47:48 2 discussing earlier this morning.

01:47:50 3 Q. In the ART process itself, how were
01:47:50 4 they used?

01:47:58 5 A. It's my understanding that those
01:48:02 6 stems were used to somehow cleanse the carbon
01:48:02 7 dioxide.

01:48:10 8 Q. Do you know whether they were put in
01:48:14 9 the absorber vessel that was used in the ART
01:48:14 10 process?

01:48:16 11 A. I'm really not that familiar with the
01:48:18 12 ART process.

01:48:24 13 Q. When they cleanse the carbon dioxide,
01:48:26 14 did that also involve absorbing nicotine in the
01:48:28 15 stems?

01:48:30 16 A. I presume so, yes.

01:48:32 17 Q. Do you know so?

01:48:34 18 A. I don't know it for a fact, no.

01:48:40 19 Q. Do you know whether as a result of
01:48:44 20 the ART process, the ART stems used in that
01:48:48 21 process had elevated levels of nicotine?

01:48:48 22 A. Yes.

01:48:58 23 Q. Do you know how elevated those levels
01:49:00 24 were as a percentage?

01:49:08 25 A. Do you want a percentage of elevation

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01:49:12 2 or percent content?

01:49:14 3 Q. Let's start with percent content.

01:49:18 4 A. Okay. I was told it was around 1 and
01:49:22 5 a half percent by weight.

01:49:24 6 Q. That was after the ART process?

01:49:24 7 A. That's correct.

01:49:26 8 Q. Those same stems, when they went into
01:49:30 9 the ART process, do you have any idea what the
01:49:32 10 nicotine content was by weight?

01:49:32 11 A. Not specifically, no.

01:49:32 12 Q. Do you know generally?

01:49:36 13 A. Generally, they're around -- can be
01:49:38 14 from eight tenths to 1 percent.

01:49:46 15 Q. And how do you know what you just
01:49:50 16 testified, what the content by weight of the
01:49:52 17 nicotine when they came out of the ART process
01:49:54 18 was?

01:49:58 19 A. I'm sorry. Would you just repeat
01:49:58 20 that?

01:50:00 21 Q. Sure. The nicotine content of the
01:50:04 22 ART stems when they emerged from the ART process
01:50:08 23 you testified was, I believe, approximately 1.5
01:50:10 24 percent by weight; correct?

01:50:10 25 A. That's correct.

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01:50:12 2 Q. How do you know that?

01:50:14 3 A. Mr. Semp told me.

01:50:16 4 Q. Was that the same conversation with
01:50:20 5 Mr. Semp that you testified to early this
01:50:20 6 morning?

01:50:20 7 A. That's correct.

01:50:24 8 Q. Between -- sometime between late 1991
01:50:26 9 and late 1992?

01:50:26 10 A. That's correct.

01:50:28 11 Q. You don't have any more specific
01:50:30 12 recollection of when that conversation was?

01:50:32 13 A. No.

01:50:36 14 Q. What prompted that conversation?

01:50:40 15 A. Because the stems had some nicotine
01:50:44 16 on them, we wanted to be sure that they were
01:50:46 17 disposed of properly.

01:50:54 18 Q. To the best of your recollection did
01:50:56 19 this conversation occur before any of the ART
01:50:56 20 stems were disposed of?

01:50:58 21 A. To the best of my knowledge, yes.

01:51:04 22 Q. Did Mr. Semp report to you at that
01:51:06 23 time?

01:51:08 24 A. No, he did not.

01:51:20 25 Q. At the time of your conversation, was

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01:51:22 2 he still actively employed with Philip Morris?

01:51:22 3 A. Yes, he was.

01:51:26 4 Q. Do you know when he retired?

01:51:32 5 A. October 1st, 1993.

01:51:36 6 Q. How is it you remember that date?

01:51:42 7 A. Well, Philip Morris had an early
01:51:44 8 retirement plan. So a large number of people
01:51:48 9 left October 1st, 1993.

01:51:56 10 Q. Was there an event that prompted your
01:51:58 11 consultation with Mr. Semp on the subject of the
01:52:00 12 ART stems?

01:52:00 13 A. No.

01:52:04 14 Q. What brought it to your attention?

01:52:08 15 A. Well, owing to the fact that the
01:52:14 16 media in particular likes to take issues and make
01:52:18 17 something more of them than is there, our level
01:52:22 18 of concern over those types of things and not
01:52:24 19 bringing media attention to any degree prompted
01:52:26 20 us to ask the questions.

01:52:32 21 Q. You were concerned in '91, '92, with
01:52:34 22 media attention to the ART stems matter?

01:52:36 23 A. That's correct.

01:52:38 24 Q. Was this when you had first heard
01:52:40 25 about ART stems?

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A. This is when I was first approached
by Mr. Semp.

Q. Mr. Semp approached you?

A. That's correct.

Q. Was Mr. Semp responsible for disposal
of ART stems?

A. I don't know.

Q. Do you know what his position was at
the time?

A. He had a manager's title, and it
changed numerous times. So I don't know what it
was at the time. A small group of people that
supported -- his responsibility was to support
the processing plants on technical issues.

Q. When you say "the processing plants,"
in that context do you include Park 500 as one of
those plants?

A. That's correct.

Q. Was Mr. Semp based at Park 500?

A. No.

Q. What role did you play in the
disposal of the ART stems?

MR. NUNLEY: Objection as to form.

A. Basically I provided my job

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2 function.

3 Q. In this context, your job function
4 was what?

5 A. Director of environmental compliance
6 and engineering.

7 Q. And how did that relate to the
8 disposal of ART stems? What did that involve?

9 A. Reviewing the material and to assist
10 in designating its proper disposal.

11 Q. Following your conversation with
12 Mr. Semp, who did you next talk to about ART
13 stems?

14 A. I don't recall talking to anyone, at
15 that particular time.

16 Q. You don't recall your next discussion
17 with anybody on the subject of ART stems?

18 A. I didn't understand the question. I
19 probably over the time period had several
20 conversations with Mr. Semp, and one or more with
21 Mr. Whitman.

22 Q. And the purpose of your
23 conversations, those conversations, were they
24 different or the same?

25 MR. NUNLEY: Objection. Compound.

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55:24 2 A. Could you repeat that?

01:55:26 3 Q. The question simply was, was the
01:55:28 4 purpose of those separate conversations the same
01:55:28 5 purpose, or different?

01:55:32 6 A. Disposal of the ART stems.

01:55:34 7 Q. Did you initiate the conversations?

01:55:38 8 A. Some.

01:55:42 9 Q. You mentioned earlier that you
01:55:44 10 reviewed materials in connection with the ART
01:55:46 11 stems. What materials did you review?

01:55:54 12 A. When you dispose of things, you look
01:55:58 13 at the rules and regulations that might apply and
56:00 14 assess whether they do or not.

01:56:02 15 Q. What rules were those that you looked
01:56:02 16 at?

01:56:10 17 A. RCRA and the disposal.

01:56:16 18 Q. Did you make a determination as to
01:56:18 19 whether the RCRA rules applied?

01:56:20 20 A. I did not personally, no. But a
01:56:22 21 determination was made.

01:56:22 22 DIR Q. And what was that determination?

01:56:24 23 MR. NUNLEY: That determination was
01:56:26 24 made by counsel.

01:56:28 25 THE WITNESS: Yes, it was.

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01:56:30 2 MR. KILLORY: Are you instructing him
01:56:32 3 not to answer what the determination was?

01:56:34 4 MR. NUNLEY: Certainly. It's
01:56:36 5 attorney-client privilege.

01:56:42 6 Q. Who administers RCRA? Which agency?

01:56:52 7 A. Can you define "administer"?

01:56:54 8 Q. What agency of government is
01:57:02 9 responsible for enforcing RCRA? RCRA, I take it,
01:57:02 10 R-C-R-A?

01:57:04 11 A. Yes.

01:57:04 12 Q. The environmental statute?

01:57:08 13 A. Right. EPA and in some cases the
01:57:10 14 state has some responsibility.

01:57:12 15 Q. Did you have any contact with the EPA
01:57:16 16 in connection with the disposal of ART stems? By
01:57:20 17 "contact," I include filings, personal meetings,
01:57:26 18 intended broadly.

01:57:28 19 MR. NUNLEY: With EPA.

01:57:30 20 A. With EPA? No.

01:57:30 21 Q. Did you have any contact, again
01:57:34 22 defined similarly, broadly, with any state agency
01:57:36 23 in connection with the disposal of ART stems?

01:57:36 24 A. No.

01:57:38 25 Q. No contact at all?

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57:38 2 A. I didn't, no.

01:57:40 3 Q. Did anyone in your office that you're
01:57:42 4 aware of have contact with EPA?

01:57:44 5 A. No.

01:57:44 6 Q. With the state agencies?

01:57:46 7 A. No.

01:57:50 8 Q. Did anyone in Philip Morris have --
01:57:52 9 on behalf of Philip Morris have contact with the
01:57:58 10 EPA in regard to ART stem disposal?

01:57:58 11 A. I believe so.

01:57:58 12 Q. Do you know who that would have
01:58:00 13 been?

58:00 14 MR. NUNLEY: To the extent it's
01:58:00 15 someone other than counsel, you can answer the
01:58:00 16 question.

01:58:02 17 THE WITNESS: Then I can't answer the
01:58:02 18 question.

01:58:06 19 Q. The question is who. You can say
01:58:08 20 "counsel." That's not invading the privilege.
01:58:10 21 Was it counsel?

01:58:10 22 A. Counsel.

01:58:12 23 Q. How about state agencies? Do you
01:58:12 24 know whether counsel -- anyone at Philip Morris,
01:58:16 25 on Philip Morris's behalf, I should say, had

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2 contact with the state agencies in connection
3 with the ART stem disposal?

4 A. I don't remember exactly which
5 agency -- agency or agencies was contacted by
6 counsel.

7 Q. Are you aware of any written
8 submissions to any governmental agencies on
9 behalf of Philip Morris in connection with the
10 ART stem disposal?

11 A. No.

12 Q. What questions did you ask of
13 Mr. Whitman, if any, in your conversation about
14 ART stem disposal?

15 A. I can't remember. The only thing I
16 can remember asking him is where we were on what
17 was left and what had been disposed of.

18 Q. And do you remember at what point in
19 the process of the ART stem disposal that was?

20 A. No.

21 Q. You don't remember what he told you
22 in terms of how much had been disposed of?

23 A. No.

24 Q. Do you know what the overall amount
25 to be disposed of of ART stems was?

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01:59:40 2 MR. NUNLEY: At what point in time?

01:59:42 3 MR. KILLORY: The total amount.

01:59:46 4 A. No. I don't.

01:59:48 5 Q. Was there any time that you became
01:59:54 6 aware of an amount of ART stem disposals that had
01:59:54 7 been disposed of?

01:59:58 8 A. At one point --

01:59:58 9 MR. NUNLEY: Objection. Excuse me,
02:00:00 10 Mr. Merrill. Objection as to form.

02:00:04 11 Q. You can answer.

02:00:08 12 A. At one point a number, 600 and
02:00:10 13 some-odd thousand pounds.

02:00:14 14 Q. Do you remember the context in which
02:00:14 15 you heard that figure?

02:00:22 16 A. Context as to was it total or was
02:00:22 17 it --

02:00:24 18 Q. I took it from your prior answer that
02:00:26 19 you never heard of a total figure, that that was
02:00:28 20 a figure you heard at some point in the process.

02:00:30 21 A. That was a figure. It could have
02:00:32 22 been the total, it could have been part. I don't
23 know.

02:00:34 24 Q. And my only question was, do you
02:00:34 25 recall the context in which you heard reference

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2 to 600,000 pounds of ART stems.
00:38 2
02:00:42 3 A. Not specifically, no.
02:00:46 4 Q. Do you know who mentioned it?
02:00:48 5 A. No. It would have either been
02:00:48 6 Whitman or Semp.
02:00:50 7 Q. But you can't recall which of the
02:00:52 8 two?
02:00:54 9 MR. NUNLEY: Mr. Merrill, you need to
02:00:56 10 say no.
02:00:58 11 A. Say no. I'm sorry.
02:01:02 12 Q. Do you know whether any permit was
02:01:06 13 ever applied for in connection with -- by Philip
01:10 14 Morris in connection with the disposal of the ART
02:01:12 15 stems?
02:01:12 16 A. Not --
02:01:12 17 MR. NUNLEY: Objection. To the
02:01:16 18 extent that presumes a permit was required, I
02:01:16 19 don't know that that's been established.
02:01:20 20 MR. KILLORY: I just asked whether
02:01:22 21 any permit was ever applied for.
02:01:24 22 Q. Did you answer the question? You
02:01:26 23 started to. You can answer.
02:01:30 24 A. None was required.
02:01:34 25 Q. So none was ever -- no permit was

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2 ever applied for?

01:34 3 A. That's correct.

02:01:36 4 Q. It's possible, is it not, that permit
02:01:42 5 applications can be filed even when it turns out
02:01:46 6 they are not required? Isn't that correct?

02:01:48 7 A. I don't know.

02:01:56 8 MR. KILLORY: Can I have literally a
02:02:04 9 one-minute break?

02:02:06 10 MR. NUNLEY: Sure.

02:02:08 11 THE VIDEO OPERATOR: We're going off
02:02:12 12 the record. The time on the screen is 2:02:08.

02:02:12 13 (A recess was taken.)

(04:12 14 THE VIDEO OPERATOR: We're back on
02:04:16 15 the record. The time on the screen is 2:04:14.

02:04:18 16 Q. Mr. Merrill, are you aware of any
02:04:20 17 efforts by Philip Morris to include the ART stems
02:04:22 18 in the BL process?

02:04:26 19 A. No.

02:04:34 20 Q. Are you aware of any tests of ART
02:04:36 21 stems to be included in the BL process?

02:04:38 22 A. No.

02:04:42 23 Q. Are you aware of any efforts by
02:04:46 24 Philip Morris to add the ART stems to the RL
02:04:48 25 process?

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02:04:48 2 A. No.

02:04:54 3 Q. Did you ever hear of that as a
02:04:56 4 possibility?

02:05:02 5 A. I heard a rumor that it might be
02:05:06 6 looked at. But I have no knowledge of that it
02:05:06 7 was.

02:05:08 8 Q. Did you ever attend any meetings
02:05:10 9 where that subject was discussed?

02:05:10 10 A. No.

02:05:24 11 Q. Do you recall from whom you heard the
02:05:28 12 rumor as to the use of ART stems in RL?

02:05:28 13 A. No.

02:05:30 14 Q. Do you recall when that would have
02:05:32 15 been?

02:05:32 16 A. No.

02:05:42 17 Q. I take it you never heard any results
02:05:46 18 of any testing of RL product using ART stems?

02:05:48 19 A. That's correct.

02:06:02 20 Q. Are you aware of any determination
02:06:08 21 one way or the other as to whether ART stems were
02:06:10 22 in fact used in any RL product?

02:06:12 23 MR. NUNLEY: Objection as to form.

02:06:16 24 A. No.

02:06:18 25 Q. You're not aware of any

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2 determination?

06:18

02:06:20 3 A. I'm not aware of any determination.

02:06:30 4 Q. Are you aware of whether any

02:06:36 5 cigarettes including RL finished product

02:06:38 6 containing ART stems were ever sold to the

02:06:38 7 public?

02:06:42 8 A. No.

02:06:44 9 Q. You don't know one way or the other?

02:06:46 10 A. Don't know one way or the other.

02:06:52 11 Q. At the time of your discussions with

02:06:58 12 Mr. Semp and Mr. Whitman regarding ART stem

02:07:02 13 disposal, was there any discussion as to use of

02:07:06 14 the ART stems other than disposing of them?

02:07:10 15 A. Not that I recall, no.

02:07:12 16 Q. Did you ever have any conversation

02:07:18 17 with Mr. Burnley regarding ART stems?

02:07:18 18 A. Not that I recall.

02:07:38 19 Q. You never have been part of the

02:07:42 20 research and development department at Philip

02:07:42 21 Morris; is that correct?

02:07:44 22 A. That's correct.

02:07:48 23 Q. Have you ever attended meetings that

02:07:50 24 you can recall with R&D people?

02:07:54 25 MR. NUNLEY: Objection as to form.

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It's exceedingly vague, I believe.

Q. In your capacity, in your positions at Philip Morris, have you been called upon to attend R&D meetings?

A. Many times.

Q. What have been the subject matters of those?

A. That covers a very wide spectrum.

Q. Why would -- in which capacity have you had reason to attend R&D meetings?

A. Manager of cigarette manufacture and development. Manager of cigarette machine evaluation. Director of environmental compliance and engineering.

Q. Do you recall any of those meetings having as one of the subject matters ART stems? Or I take that back. The ART project.

A. I don't recall any.

MR. KILLORY: Could you mark this as Merrill 2, please.

(Merrill Exhibit 2 for identification, minutes of the R&D strategic planning committee meeting, April 28th, 1989.)

Q. Mr. Merrill, the court --

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MR. NUNLEY: Mr. Killory, he's just been handed it. Can he take a look at it for a second?

MR. KILLORY: I was about to identify the document.

Q. Mr. Merrill, the court reporter has ^{Just} handed you a document that has been marked as Merrill Exhibit 2. It bears ^{the Bates Stamp} PA 835863 on the first page, running through PA 835870. The production number is 2022177263. The production number on the last page is 2022177270.

It's an interoffice correspondence to distribution from Ted Sanders, minutes of the R&D strategic planning committee meeting, April 28th, 1989.

Could you take a look at the document, please.

(Witness complies.)

Q. Have you had a chance to look at Exhibit Number 2? Exhibit Number 2, as I said, is minutes of the R&D strategic planning meeting of April 28th, 1989, strategic planning committee meeting. The first paragraph indicates that you were present and the distribution at the end

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02:12:50 2 indicates that you were sent a copy.

02:12:50 3 Do you have any recollection of this
02:12:54 4 meeting of the R&D strategic planning committee?

02:12:56 5 A. No, I do not.

02:12:58 6 Q. Did you ever serve as a member of the
02:13:00 7 R&D strategic planning committee?

02:13:00 8 A. Yes, I did.

02:13:02 9 Q. During what period of time?

02:13:08 10 A. Other than the fact that this piece
02:13:12 11 of paper says 1989, I have no recollection of the
02:13:16 12 time period. So -- as a matter of fact, if you
02:13:20 13 take a look at the last page, there were two
02:13:20 14 representatives -- next to the last page, I'm
02:13:22 15 sorry, there were two representatives from then
02:13:28 16 the engineering department; myself and L. X.
02:13:28 17 Nghiem.

02:13:32 18 And our part was just to be part of a
02:13:34 19 cross functional team to review the different
02:13:38 20 issues and project requirements.

02:13:44 21 Q. I notice Mr. Semp is also included on
02:13:44 22 the distribution list for this. Was Mr. Semp in
02:13:46 23 the engineering department?

02:13:46 24 A. No.

02:13:54 25 Q. If I could call your attention to

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2 portions of the first two pages, on the first
3 page of Exhibit 2, a portion of paragraph 1,
4 talking about the -- the paragraph generally
5 talks about the allocation of R&D resources.

6 If you go down midway through the
7 paragraph, it says, "Project ART is also
8 utilizing considerably greater resources than
9 anticipated last year. This is not surprising
10 given the imminence of introducing the ART
11 product."

12 Then continuing over on the second
13 page, the subparagraph number 2 is labeled,
14 "Flavor for project ART." Could you take a look
15 at that paragraph, please.

16 (Witness complies.)

17 Q. Do you recall any of the discussion
18 reflected on those parts of page 1 and page 2 of
19 Exhibit 2 regarding the ART project?

20 A. No.

21 Q. Sitting here today do you recall any
22 discussion of consumer testing of ART product?

23 A. No.

24 Q. The sentence that reads in that
25 paragraph 2 on page 2, the sentence that reads,

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02:16:14 2 "Both nicotine and menthol are known trigeminal
02:16:18 3 stimulants," do you know what trigeminal
02:16:20 4 stimulants are?

02:16:20 5 A. No, I do not.

02:16:22 6 Q. Do you have any understanding of what
02:16:24 7 trigeminal is?

02:16:26 8 A. None.

02:16:40 9 Q. If you could look briefly at page 3.
02:16:46 10 Paragraph B is headed, "Competitive analysis."
02:16:50 11 Could you quickly take a look at that paragraph?
02:16:54 12 It has a number of subitems underneath it.

02:16:54 13 (Witness complies.)

02:16:58 14 Q. My question, to make your reading
02:17:00 15 easier, reading this paragraph, do you recall any
02:17:02 16 discussion at this meeting or any other meeting
02:17:06 17 of the competitive analysis as reflected in these
02:17:06 18 minutes?

02:17:10 19 A. Other than the fact that you've given
02:17:12 20 this to me, I don't even recall the meeting.

02:17:16 21 Q. Independent of the document itself,
02:17:18 22 do you have any recollection of any discussion at
02:17:22 23 a meeting of a competitive analysis in the sense
02:17:28 24 that competitive analysis appears to be used in
02:17:30 25 this paragraph?

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MR. NUNLEY: Objection. I believe that question is impossibly overbroad and vague.

MR. KILLORY: Let me rephrase the question. I was trying to do it the quick way.

Q. Do you recall any discussion of RJR -- do you know what TIS is, the initials TIS stand for? It's on item 8 of paragraph B.

MR. NUNLEY: Is the question, Mr. Killory, does he know what the author had in mind --

Q. Do you have an understanding of what TIS represents?

A. No.

Q. Do you recall any discussion of RJR in the context of specific sources to investigate sources of information?

A. I'm not sure I understand the question.

Q. Paragraph B, the last sentence^{says} "The subgroup has determined to investigate the following sources of information." Item 8, "Specific sources, RJR-TIS connections." My only question is, do you have any recollection of any discussion at any meeting about RJR as a

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1 Merrill - Highly Confidential - Trade Secret
02:18:32 2 source of information?
02:18:34 3 MR. NUNLEY: Objection as to form.
02:18:36 4 Source of information about TIS connections?
02:18:40 5 MR. KILLORY: ^{Man-m}~~No~~. He testified he
02:18:42 6 doesn't know what TIS stands for. RJR as a
02:18:44 7 source of information.
02:18:44 8 MR. NUNLEY: About what?
02:18:46 9 MR. KILLORY: About any subject.
02:18:48 10 MR. NUNLEY: Objection as to
02:18:48 11 vagueness.
02:18:58 12 Q. You can answer.
02:19:00 13 A. I don't know how to answer.
02:19:04 14 Q. Did you ever have a meeting where you
02:19:06 15 recall discussing RJR as a source of information
02:19:08 16 for Philip Morris?
02:19:10 17 A. Source of information -- source of
02:19:12 18 any information? Yes.
02:19:22 19 Q. And you don't recall what TIS stands
02:19:22 20 for?
02:19:22 21 A. No.
02:19:24 22 Q. So you have no idea ^{what} whether RJR is
02:19:28 23 the potential source of information for reflected
02:19:28 24 in this paragraph?
02:19:38 25 A. That's correct.

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02:19:46 2 Q. On page 5, the lead paragraph,
02:19:50 3 subparagraph ^{small letter} ~~smaller~~ A, entitled "Pilot plant and
02:19:56 4 Semi-Works exposure," could you read that
02:19:56 5 paragraph please, Mr. Merrill.

02:19:58 6 (Witness complies.)

02:20:40 7 A. Okay.

02:20:44 8 Q. Do you recall any discussion on the
02:20:46 9 subject reflected in that paragraph?

02:20:48 10 MR. NUNLEY: Objection, Mr. Killory.
02:20:52 11 I see a number of subjects, I believe.

02:20:54 12 Q. Do you recall a discussion reflecting
02:20:56 13 any of the topics in that paragraph?

02:20:58 14 A. No.

02:21:02 15 Q. Do you know whether in fact the plan
02:21:08 16 that was being described in this paragraph for a
02:21:10 17 small group of people each year to obtain both
02:21:12 18 cigarette making and tobacco processing
02:21:14 19 experience was ever implemented?

02:21:16 20 A. No, I do not.

02:21:30 21 Q. On page 6, Mr. Merrill, under H, item
02:21:36 22 2, H is "Recommendations for the 1988 plan."
02:21:38 23 Item 2 is "Antismoking group strategies, Kathy
02:21:40 24 Ellis will inquire as to what is being done in
02:21:42 25 this area at the corporate level."

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02:21:42 2 Do you recall any discussion on that
02:21:44 3 subject?

02:21:44 4 A. No.

02:21:48 5 Q. Do you know who Kathy Ellis is?

02:21:48 6 A. Yes, I do.

02:21:50 7 Q. Who is Kathy Ellis?

02:21:54 8 A. At this present time?

02:21:56 9 Q. What position does she hold?

02:22:00 10 A. Presently she is the director of
02:22:02 11 applied research, I believe her title is.

02:22:04 12 Q. Do you know what position she held in
02:22:06 13 1989?

02:22:08 14 A. Not specifically.

02:22:12 15 Q. Was she in the R&D department?

02:22:12 16 A. Yes, she was.

02:22:16 17 Q. But you have no recollection of any
02:22:18 18 discussion regarding the antismoking group
02:22:18 19 strategies?

02:22:22 20 A. No, I don't remember any of the
02:22:24 21 subjects that are addressed in this document.

02:22:26 22 Q. What kinds of information do you
02:22:30 23 recall in the course of your work RJR being a
02:22:32 24 source for?

02:22:36 25 MR. NUNLEY: Source or potential

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1 Merrill - Highly Confidential - Trade Secret
02:22:38 2 source?

02:22:38 3 MR. KILLORY: Okay.

02:22:40 4 Q. Source or potential source?

02:22:42 5 MR. NUNLEY: If you ask it that way
02:22:44 6 it's objectionable. It's compound.

02:22:46 7 Q. Let's start with source.

02:22:54 8 A. Philip Morris and R.J. Reynolds were
02:23:00 9 looking to work together in certain areas on the
02:23:04 10 subject matter of environmental tobacco smoke.

02:23:14 11 Q. In the course of that work, did you
02:23:18 12 meet with RJR personnel?

02:23:18 13 A. Yes.

02:23:20 14 Q. When was this?

02:23:30 15 A. Sometime since 19 -- June of 1991.

02:23:42 16 Q. And what was the nature of the joint
02:23:46 17 effort regarding indoor tobacco smoke?

02:23:50 18 MR. NUNLEY: Objection. I believe
02:23:50 19 the witness testified it was environmental
02:23:54 20 tobacco smoke. And also I object, I don't know
02:23:56 21 of any relevance that this line of inquiry would
02:23:58 22 have to the issues in this case.

02:24:04 23 Q. You can answer the question.

02:24:04 24 A. Could you repeat it?

02:24:08 25 Q. What was the nature of the joint

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1 Merrill - Highly Confidential - Trade Secret
02:24:12 2 effort between Philip Morris and RJR regarding
02:24:16 3 environmental tobacco smoke?

02:24:24 4 A. Looking at what each group had done
02:24:26 5 in that area.

02:24:34 6 MR. NUNLEY: Mr. Killory, I don't
02:24:36 7 know if you're finished with your questions as to
02:24:38 8 Merrill Exhibit 2. If so, I move to strike all
02:24:42 9 questions and all answers in that an appropriate
02:24:44 10 foundation was not laid for the document.

02:24:46 11 Mr. Merrill was not asked if he was
02:24:48 12 the author. He was not asked if he was the
02:24:50 13 recipient or if he has ever seen it before. So I
02:24:52 14 move to strike all the questions and answers.

02:25:00 15 Q. Mr. Merrill, as we discussed, you're
02:25:04 16 shown as a recipient. Do you know whether you
02:25:04 17 ever received this document?

02:25:10 18 A. No, I do not.

02:25:10 19 Q. Do you have any reason to believe
02:25:14 20 that the recipient list is erroneous?

02:25:16 21 MR. NUNLEY: Objection. Calls for
02:25:16 22 speculation.

02:25:18 23 Q. You can answer.

02:25:18 24 A. I have no idea.

25 (Merrill Exhibit 3 for

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1 Merrill - Highly Confidential - Trade Secret
2 identification, interoffice correspondence from
3 Mr. Hensley and Mr. Pate.)

02:26:18 4 Q. Mr. Merrill, you've been handed a
02:26:20 5 document that is marked Merrill Exhibit 3. There
02:26:26 6 is the initial Bates stamp PA 561357 through PA
02:26:30 7 561360. The first production number on the first
02:26:36 8 page is 2030963083, concluding production number
02:26:40 9 is 2030963086.

02:26:46 10 Take a quick look at that document,
02:26:48 11 please, Mr. Merrill.

02:26:48 12 (Witness complies.)

02:27:54 13 Q. Mr. Merrill, do you recall ever
02:27:56 14 having seen Merrill Exhibit 3?

02:28:00 15 A. No, I do not.

02:28:06 16 Q. Were you ever aware of any trial runs
02:28:10 17 using Bermuda stems on line 3 at Park 500?

02:28:12 18 A. Could you repeat that, please?

02:28:14 19 Q. Were you ever aware of any trial runs
02:28:18 20 using Bermuda stems on line 3 at Park 500?

02:28:24 21 A. Could you define "trial run," ^{or} be more
02:28:24 22 specific? *if you could*

02:28:28 23 Q. Trial run -- are you aware of any
02:28:32 24 runs, production runs --

02:28:32 25 A. No.

1 Merrill - Highly Confidential - Trade Secret

2 Q. When I say "production runs," let me
3 be very specific. Production runs of a test,
4 experimental nature, using Bermuda stems at Park
5 500.

6 MR. NUNLEY: Objection as to form.

7 MR. KILLORY: I haven't yet asked the
8 question:

9 Q. Are you aware of any such runs?

10 MR. NUNLEY: Same objection.

11 A. No.

12 Q. You have never had any conversations
13 with Mr. Burnley on that subject?

14 A. No, I have not.

15 Q. No conversations with anyone else on
16 the subject of trial runs at Park 500 of Bermuda
17 stems?

18 A. No, I have not.

19 Q. Do you understand what "Bermuda
20 stems" refers to?

21 A. My understanding of Bermuda stems
22 were the stems that were used at Bermuda.

23 Q. The Bermuda Hundred facility?

24 A. Correct.

25 Q. So when you're saying "Bermuda stems"

MANHATTAN REPORTING CORP.

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1 Merrill - Highly Confidential - Trade Secret

02:29:30 2 it's the same as the ART stem reference;
02:29:32 3 correct?

02:29:32 4 A. That's correct.

02:30:24 5 MR. KILLORY: Could you mark that,
02:30:24 6 please.

7 (Merrill Exhibit 4 for
8 identification, Project Name ART Stem Disposal.)

02:30:56 9 Q. Mr. Merrill, the court reporter is
02:30:58 10 handing you a document marked Merrill Exhibit
02:31:00 11 Number 4. The first Bates stamp is a series of
02:31:08 12 pages. I believe the Bates ^{Stamping} stamp is
02:31:14 13 consecutive. PA 306830 is the first page. PA
02:31:18 14 306869 is the last page. And the corresponding
02:31:26 15 production numbers are 2030020656, concluding
02:31:32 16 with -- the very last page, there does not appear
02:31:34 17 to be a production number. The next to last page
02:31:38 18 it's 2030020696.

02:31:44 19 It appears to be a file of documents,
02:31:46 20 "Project name ART stem disposal" on the front
02:32:02 21 cover. I would like you to just glance at the
02:32:06 22 file, if it in fact is a file, and ask you
02:32:10 23 whether you recall ever seeing this file of
02:32:10 24 documents before.

02:32:12 25 (Witness complies.)

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1 Merrill - Highly Confidential - Trade Secret

02:39:06 2 MR. NUNLEY: While Mr. Merrill is
02:39:08 3 continuing to look at that, I would just say for
02:39:08 4 the record, for the sake of the jury, this
02:39:12 5 document is about 40 pages long. Most of it is
02:39:18 6 handwritten. It will take some time to look
02:39:18 7 through it.

02:39:44 8 Q. Mr. Merrill, have you had a chance to
02:39:46 9 look at Exhibit Number 4?

02:39:46 10 A. Yes, I have.

02:39:50 11 Q. Do you recall seeing any of the
02:39:54 12 documents in Exhibit Number 4 before?

02:39:58 13 A. Some of the pages look familiar.

02:40:00 14 Q. Can you point out to me which pages
02:40:02 15 look familiar?

02:41:30 16 A. PA 306836. PA 306840 through 44. PA
02:41:48 17 306853, 54, 56. No, they're the same. 53, 54,
02:41:50 18 56 and 57 appear to be the same.

02:41:54 19 Q. The same document?

02:42:04 20 A. They appear to me to be. And there's
02:42:08 21 no -- oh, here it is. It's in the wrong place.

02:42:18 22 Q. When I said "the same document" I
02:42:20 23 didn't mean the identical page. Did you take
02:42:22 24 that to mean what I meant when you were
02:42:26 25 discussing those -- I meant all one document, for

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853, 54, 56 and 57.

A. 53 and 54 and 56 and 57 appear to be a duplication. They're not separate. There's nothing different about them. They appear to be two copies of the same document. That happened several times in there. There are several duplications, it appears.

Q. I don't see the duplication. Which pages appear to be duplicates? You mean 853, 54, 55, you took to be a duplicate of 56, 57, 58?

A. 53 and 5 -- oh, okay. I see what you're saying. Right. So of those two ^{I don't} -- I saw "MR. KILLORY: Okay, okay." one that looked like these. [^] I saw one that looked like these.

Q. ^{So} One of those two, could have been possibly both?

A. I don't honestly know. The last one that --

Q. Just so the record is clear, they are not duplicate pages, correct?

A. You're correct, yes, they are similar in form, but the information is different.

Q. You were about to tell me about another page.

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1 Merrill - Highly Confidential - Trade Secret

02:44:16 2 A. If I can read it here. 6330686 --
02:44:24 3 no, it's not 63. I'll try to get this -- this
02:44:24 4 drawing.

02:44:24 5 Q. The chart.

02:44:26 6 A. Oh, it's over here. 64.

02:44:32 7 Q. 864?

02:44:36 8 A. 864.

02:44:48 9 Q. If I could ask you to turn to page
02:44:54 10 306833, that's the PA number. This is not one of
02:44:58 11 the pages you identified, by the way. At the top
02:45:00 12 of that page -- do you recognize this
02:45:00 13 handwriting?

02:45:02 14 A. No.

02:45:06 15 Q. At the top of the page, in the
02:45:08 16 handwritten notation it says, "Problem, PM U.S.A.
02:45:12 17 has no existing method for the disposal of ART
02:45:16 18 stems in environmentally acceptable manner."
02:45:20 19 Then followed by "Methods considered thus far,"
02:45:22 20 and it lists two methods.

02:45:24 21 Do you recall anybody discussing with
02:45:28 22 you the subject of how to dispose of these ART
02:45:30 23 stems in an environmentally acceptable manner?

02:45:34 24 A. Yes.

02:45:34 25 Q. Any conversations outside of the

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1 Merrill - Highly Confidential - Trade Secret
t 02:45:38 2 conversations with Mr. Semp and Mr. Whitman that
02:45:38 3 you've testified to?
02:45:38 4 A. No.
02:45:48 5 Q. Were you aware of different methods
02:45:52 6 being tested for the disposal of ART stems?
02:45:56 7 A. No, I was not.
02:46:02 8 Q. If you could turn to page PA 306836,
02:46:12 9 which is one of the pages you identified. Who is
02:46:14 10 Sheida Shakeri, do you know?
02:46:18 11 A. ^{I have} No idea.
02:46:20 12 Q. Do you recall the context in which
02:46:22 13 you have seen this document before?
02:46:28 14 A. On Wednesday morning, March 23rd,
02:46:28 15 1994.
02:46:32 16 Q. Was this one of the documents
02:46:38 17 collected by Mickey Annamanthadoo and yourself?
02:46:42 18 A. It appears -- it appears familiar.
02:46:50 19 Q. But at the time -- it's very hard to
02:46:52 20 read the date on the document, but I believe it's
02:46:56 21 1991, December of 1991. At that time, you don't
02:46:58 22 recall receiving a copy of this handwritten
02:47:00 23 memo?
02:47:00 24 A. No.
02:47:06 25 Q. You don't recall that different types

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1 Merrill - Highly Confidential - Trade Secret
02:47:10 2 of tests were used to test methods of disposing
02:47:12 3 of ART stems?

02:47:14 4 A. No.

02:47:16 5 Q. Did you ever become aware of that?

02:47:20 6 A. Not until now.

02:47:24 7 Q. By "now," you mean --

02:47:26 8 A. The document ^{that} you have just given to
02:47:30 9 me.

02:47:32 10 Q. At the time of the FDA tour, when
02:47:36 11 Mickey Annamanthadoo gathered documents for you,
02:47:38 12 were you aware at that time that different
02:47:44 13 methods had been tested for the disposal of ART
02:47:44 14 stems?

02:47:46 15 MR. NUNLEY: I'm going to object. Is
02:47:48 16 there a representation by counsel that indeed
02:47:52 17 different types of methods were tested or were
02:47:54 18 simply considered?

02:47:58 19 MR. KILLORY: Multiple test forms.

02:48:00 20 Q. All I'm asking is what you
02:48:00 21 understand.

02:48:02 22 MR. NUNLEY: Just so the record is
02:48:06 23 clear, Mr. Killory, you're not suggesting there
02:48:08 24 were alternate methods tested?

02:48:10 25 MR. KILLORY: Clearly the document we

1 Merrill - Highly Confidential - Trade Secret
2 already reviewed, "Methods considered thus far,"
3 and it has multiple methods. We then proceeded
4 to a test request form that starts with ~~the~~ Document
5 number 836.

6 Q. My only question is, were you aware
7 of --

8 MR. NUNLEY: Wait a minute. Let's
9 close the door on that.

10 MR. KILLORY: Let's get the witness's
11 testimony as to whether you're aware of multiple
12 test methods being considered ^{MR. NUNLEY: Well, so the...} for Park 500 so we
13 have a clear -- let me continue. You can
14 clarify, Chip, if it doesn't satisfy you.

15 Q. Are you aware at the time of multiple
16 test methods being considered for the disposal of
17 ART stems?

18 MR. NUNLEY: And I object based on
19 what I've said earlier. I think Mr. Killory's
20 question suggested not that they were considered
21 but that different test methods were tested.

22 MR. KILLORY: That's right. It did.

23 MR. NUNLEY: And I don't think that's
24 established either by the testimony thus far or
25 by the document.

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1 Merrill - Highly Confidential - Trade Secret

02:49:18 2 Q. The question is what were you aware
02:49:18 3 of.

02:49:20 4 MR. NUNLEY: Objection as to form.
02:49:20 5 It's vague.

02:49:24 6 Q. Let's ask -- cover the same ground
02:49:28 7 again. Were you aware of multiple test methods
02:49:32 8 being considered for the disposal of ART stems?

02:49:34 9 A. No.

02:49:36 10 Q. Were you ever aware of multiple test
02:49:38 11 methods being performed in connection with the
02:49:40 12 disposal of ART stems?

02:49:42 13 A. No, I was not.

02:49:50 14 Q. Document number PA 306840 through
02:49:58 15 844, which is a 12/4/91 Bermuda stem transfer
02:50:02 16 meeting record, it's one of the ones you
02:50:04 17 identified as having seen before. Do you recall
02:50:06 18 when you first saw that?

02:50:14 19 A. March 23rd, 1994.

02:50:16 20 Q. Again, one of the documents collected
02:50:18 21 in connection with the FDA tour?

02:50:18 22 A. That's correct.

02:50:20 23 Q. On the second page of that document,
02:50:24 24 there's a list of items. It says, "Following
02:50:28 25 addresses each item on the December 4, 1991 memo

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1 Merrill - Highly Confidential - Trade Secret
02:50:36 2 by Bill Estes." And item 8 says, "Bill Estes to
02:50:36 3 investigate the health risk of nicotine exposure
02:50:38 4 from the ART stems."

02:50:42 5 Did you ever have -- do you know who
02:50:42 6 Mr. Estes is?

02:50:44 7 A. Yes, I do.

02:50:46 8 Q. Who is he?

02:50:52 9 A. I don't know in what capacity Bill
02:50:54 10 functioned either during this time or presently.

02:50:56 11 Q. What facility does he work at?

02:51:02 12 A. I knew Bill Estes from Park 500. My
02:51:06 13 ten days as superintendent, Bill was one of my
02:51:08 14 supervisors.

02:51:12 15 Q. One of the people you supervised?

02:51:12 16 A. That's correct.

02:51:18 17 Q. Did you ever have any conversations
02:51:20 18 with Mr. Estes regarding the health risk of
02:51:24 19 nicotine exposure from the ART stems?

02:51:26 20 A. I have had no conversations with
02:51:30 21 Mr. Estes concerning any subject matter in the
02:51:32 22 last number of years.

02:51:34 23 Q. Have you ever had any conversations
02:51:36 24 with anyone else about the subject of the
02:51:40 25 nicotine -- the risk, health risk of nicotine

1 Merrill - Highly Confidential - Trade Secret
02:51:42 2 exposure from the ART stems?
02:51:44 3 A. No, I have not.
02:51:48 4 Q. And the next page of that same
02:51:50 5 document which is one of the ones you identified
02:51:54 6 says, "Bill Estes to investigate the disposal of
02:51:56 7 ART stem empty containers." Did you ever have
02:52:00 8 any discussion with anyone on the subject of the
02:52:04 9 disposal of ART stem empty containers?
02:52:08 10 A. Not that I recall, no.
02:52:10 11 Q. Are you aware of any environmental
02:52:14 12 concerns relating to the disposal of ART stem
02:52:16 13 empty containers?
02:52:18 14 A. None comes to mind.
02:52:42 15 Q. Do you know where the ART stems
02:52:44 16 generated by the Bermuda Hundred plant were
02:52:44 17 stored?
02:52:48 18 MR. NUNLEY: At what point in time?
02:52:52 19 MR. KILLORY: When they were first
02:52:54 20 generated, let's start with that.
02:52:54 21 A. No, I do not.
02:52:56 22 Q. Do you know at any point in time
02:53:00 23 where the Bermuda Hundred stems, the ART stems
02:53:02 24 generated by the Bermuda Hundred plant were
02:53:02 25 stored?

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02:53:02 2 A. No, I do not.

02:53:38 3 Q. I believe you testified earlier that
02:53:40 4 the ART stems themselves were ultimately disposed
02:53:44 5 of, as far as you know, by landfilling them; is
6 that correct?

02:53:50 7 A. The ART stems were washed and the wet
02:53:54 8 stems after the water -- wash water was removed
02:53:54 9 were landfilled.

02:53:58 10 Q. What was removed from the ART stems
02:54:00 11 when they were washed?

02:54:02 12 A. The soluble materials.

02:54:06 13 Q. Would the nicotine be included in the
02:54:06 14 soluble materials?

02:54:08 15 A. Yes, it would.

02:54:12 16 Q. Was any nicotine left on the stems
02:54:12 17 after the wash?

02:54:18 18 A. I have no idea.

02:54:24 19 Q. That question never came up in the
02:54:26 20 context of how to dispose of the stems?

02:54:34 21 A. No.

02:54:36 22 Q. So you've never been told whether the
02:54:38 23 stems themselves after the wash contain
02:54:38 24 nicotine?

02:54:40 25 A. That's correct.

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Q. The solubles that were washed from the ART stems, how was that disposed of?

A. Basically we put the material, the stems, in the pulper with hot water and agitated them for a period of time to get the soluble materials out of the stems. And then they went through a dewatering screw and the water came out and went into a tank, and the wet stems went in a dumpster.

The dumpster went to the dump, and the liquid materials were slowly dribbled into the drain, to the waste treatment plant.

Q. This was at the Park 500 facility?

A. That's correct.

Q. How do you know what you just told me about the process, disposing of the ART stems?

A. Well, firsthand, I don't know. In conversation with Mr. Semp, that was the way it was agreed upon to handle the process.

Q. Do you know who made the decision to handle the process in that fashion?

A. Yes, I do.

Q. Who was that?

A. Me.

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Q. Were you presented with a variety of options as to how to dispose of the ART stems?

A. The ART stems could have been disposed of as they were, as I testified earlier. I chose to have them washed to make them a nonissue.

Q. What do you mean by a nonissue?

A. So at some future date someone wouldn't make erroneous allegations based on the fact that those materials were landfilled.

Q. But was it your understanding there would have been additional regulatory compliance requirements if they had been landfilled without being washed?

A. No, there would not.

Q. Did the washing process that washed the solubles containing the nicotine off the ART stems create any difficulties for the wastewater treatment facility processing?

A. No.

Q. The quantity -- was there any problem in or around 1991 or 1992 with the quantity of materials that could be processed by the wastewater treatment facility at Park 500?

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02:57:20 2 A. Could you just repeat that back?

02:57:24 3 Q. Sure. Was there any problem around
02:57:28 4 1991 or 1992 with the quantity of materials that
02:57:30 5 could be processed by the wastewater treatment
02:57:32 6 plant at Park 500?

02:57:42 7 A. Park 500 has been and is very
02:57:44 8 particular about the waste treatment plant, in
02:57:48 9 that its operation is required in order to run
02:57:52 10 the plant. So everything is approached very
02:57:54 11 cautiously with regard to that wastewater
02:57:54 12 treatment plant.

02:58:24 13 Q. In the context of your discussions
02:58:24 14 with Mr. Semp as to the method for disposal, was
02:58:26 15 there any discussion as to whether this method
02:58:30 16 chosen would create a burden on the wastewater
02:58:32 17 treatment facility?

02:58:42 18 A. I don't remember Mr. Semp or I
02:58:44 19 actually having a discussion about that specific
02:58:56 20 issue.

21 (Merrill Exhibit 5 for
22 identification, November 15, 1988 memo from W.E.
23 Poorbaugh to Mr. D.L. Milby.)

02:59:26 24 Q. Mr. Merrill, the court reporter has
02:59:32 25 just marked as Merrill Exhibit 5 a document, a

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02:59:36 2 one-page document. It's stamped PA 125852,
02:59:42 3 bearing the production number 2024412591. It's a
02:59:48 4 November 15, 1988 memo from W.E. Poorbaugh to
02:59:50 5 Mr. D.L. Milby.

02:59:56 6 MR. KILLORY: Could I also have you
02:59:56 7 mark that, please.

8 (Merrill Exhibit 6 for
9 identification, August 8th, 1988 memo from J.N.
10 Tenhet to J.D. Watkins.)

03:01:22 11 Q. Could you also take a look at what
03:01:24 12 the court reporter has just marked as Merrill
03:01:30 13 Exhibit 6. It's Bates stamped PA 360313 through
03:01:36 14 314. The production numbers are 2030485563
03:01:40 15 through 64. It's an August 8th, 1988 memo from
03:01:44 16 J.N. Tenhet to J.D. Watkins.

03:01:48 17 I'm sorry. There's a third page I
03:01:52 18 omitted in the description. The third page is PA
03:01:58 19 360315 with a production number 2030485565..

03:02:00 20 Could you take a look at Merrill
03:02:02 21 Exhibit 6, please.

03:02:02 22 (Witness complies.)

03:04:20 23 Q. Mr. Merrill, have you had a chance to
03:04:22 24 look at Merrill Exhibit 6 and 7?

03:04:28 25 A. 5 and 6.

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03:04:28 2 Q. 5 and 6.

03:04:30 3 MR. KILLORY: Let's take a break for
03:04:30 4 one second.

03:04:32 5 THE VIDEO OPERATOR: We're going off
03:04:36 6 the record. The time on the screen is 3:04:35.

03:04:38 7 (A recess was taken.)

03:29:16 8 THE VIDEO OPERATOR: This is
03:29:20 9 videotape number 3, the continuation of David
03:29:24 10 Merrill. Today is June 29th, 1995. This is tape
03:29:28 11 number 3. The time on the screen is 3:29:27.
03:29:28 12 You're on the record.

03:29:32 13 Q. Mr. Merrill, before the break you had
03:29:34 14 had a chance to look at Merrill number 5 and
03:29:36 15 number 6; correct?

03:29:36 16 A. That's correct.

03:29:42 17 Q. These are memoranda dated
03:29:46 18 respectively November 15, 1988, and August 8th,
03:29:52 19 1988, which preceded the '89-90 time frame that I
03:29:56 20 was talking to you about before. But what I
03:29:58 21 wanted to ask you was that referenced in both of
03:30:04 22 these memoranda are limitations on expansion of
03:30:08 23 Park 500 based on maximizing the capacity of the
03:30:10 24 wastewater facility at that plant.

03:30:14 25 Was that still a limitation in the

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1991-92 time frame?

A. Again, I'm not sure I understand the question. Was what a limitation?

Q. For example, on Merrill number 5, it says "The addition of Bermuda Hundred processing of machinery test center operations to the Park 500 site has resulted in maximizing our utility systems i.e. electrical, steam, wastewater and water."

In '91, '92, was it still maximized?

MR. NUNLEY: Mr. Killory, one point just to be made in fairness, I think you need to ask the witness whether or not Bermuda Hundred was still functioning.

MR. KILLORY: That's a fair point.

Q. Was Bermuda Hundred still operating in the 1991-92 time frame?

A. I'm not sure of the exact date when it went down. No.

Q. My prior question was simply, had you maximized the capacity that you could process through the wastewater treatment plant in 1991-92. Were you operating that capacity?

A. I don't know what exact capacity they

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were at at that particular point in time.

Q. You don't know whether it was -- had reached a maximum level or not?

A. No.

Q. In your consideration of the decision as to how to dispose of the ART stems, was the subject of the capacity of the wastewater treatment facility ever raised?

A. I don't recall it being raised to me.

Q. Do you recall when you made the decision to go with the wash process that you described rather than just dispose of the ART stems without washing them?

A. I don't remember the exact date.

Q. Do you remember approximately?

A. Not even approximately. Somewhere in the time frame that we're talking about here. Late '91 to sometime maybe in early '92.

Q. Late '91 through early '92?

A. Perhaps, yes.

Q. Do you know where the ART stems were disposed of after the washing process? You said they went into a dumpster and then they were

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03:32:46 2 landfilled; correct?
03:32:46 3 A. That's correct.
03:32:48 4 Q. Do you know where they were
03:32:48 5 landfilled?
03:32:52 6 A. To the best of my knowledge, they
03:32:54 7 were landfilled at Shoosmith Brothers.
03:32:58 8 Q. Are there any records that you are
03:33:00 9 aware of at Philip Morris that would reflect the
03:33:08 10 volume of ART stems that were disposed of in the
03:33:08 11 landfill?
03:33:10 12 A. No.
03:33:18 13 Q. Did you have any belief as to whether
03:33:20 14 such records were created at the time of the
03:33:22 15 disposal?
03:33:26 16 A. They would have been disposed of
03:33:30 17 under normal circumstances along with every other
03:33:34 18 item that would be disposed of at the dump from
03:33:36 19 the facility.
03:33:42 20 Q. Are disposal records -- were disposal
03:33:42 21 records at that time created at the landfill when
03:33:44 22 the materials were dumped?
03:33:50 23 A. When you dispose of items in the
03:33:52 24 landfill, the only thing they're interested in or
03:33:56 25 anybody's interested in is the tipping fee and

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03:33:56 2 the hauling fee.

03:33:58 3 So the only record that would have
03:34:02 4 been created would have said, for example, for
03:34:06 5 the month of March, Park 500 shipped 872 tons to
03:34:10 6 Shoosmith, and therefore we're billing you 872
03:34:14 7 times the tipping fee plus the hauling charges.
03:34:16 8 That's the only type of record that would have
03:34:16 9 been created.

03:34:18 10 Q. So there would -- and the hauling
03:34:22 11 charge and tipping fee are based on weight; is
12 that correct?

03:34:24 13 A. No. The hauling charge is a fixed
03:34:26 14 charge per truck hauling, and then you have a
03:34:28 15 tipping fee.

03:34:30 16 Q. Is the tipping fee based on the
03:34:32 17 weight of the materials being landfilled?

03:34:34 18 A. That's correct.

03:34:40 19 Q. Are those records then kept by Philip
03:34:42 20 Morris?

03:34:44 21 A. I'm not sure how long those
03:34:46 22 particular -- ~~the~~ invoices are kept.

03:34:48 23 Q. But those records would be created
03:34:52 24 for any waste disposal in a landfill?

03:34:54 25 A. That's correct.

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03:34:58 2 Q. But you're not aware of how far back
03:35:00 3 the records for Park 500 go?

03:35:02 4 A. No, I'm not sure how far back they
03:35:04 5 would keep the invoices from Shoosmith.

03:35:06 6 Q. Do you know who would know the answer
03:35:08 7 to that question?

03:35:16 8 A. It's perhaps someone in finance. I
03:35:16 9 don't know.

03:35:20 10 Q. Would it be anyone at Park 500?

03:35:20 11 A. Possibly.

03:35:22 12 Q. But you don't know who?

03:35:22 13 A. No.

03:35:30 14 Q. When you made the decision to go with
03:35:34 15 the washing process as part of the disposal, was
03:35:36 16 any document created reflecting that decision?

03:35:42 17 A. None that I can recall, no.

03:35:44 18 Q. You didn't draft a memo or anything
03:35:44 19 like that?

03:35:46 20 A. No.

03:35:50 21 Q. Did you consult with anyone else at
03:35:52 22 Philip Morris regarding that decision?

03:35:54 23 A. Not that I recall.

03:35:56 24 Q. You didn't consult with your
03:35:58 25 superior?

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03:36:00 2 A. Again, I can't remember.

03:36:04 3 Q. You mentioned that one concern you
03:36:06 4 had in making the decision was the possibility of
03:36:10 5 media attention, if the stems were disposed of
03:36:12 6 without the washing process. Had there been some
03:36:16 7 prior media attention to disposal of nicotine
03:36:18 8 containing substances?

03:36:24 9 A. Not that I'm aware of, no.

03:36:26 10 Q. So the source of your concern was a
03:36:28 11 more generalized one, there wasn't any particular
03:36:30 12 incident that caused you to have a concern about
03:36:34 13 media attention to the disposal of ART stems?

03:36:36 14 A. That's correct, yes.

03:36:46 15 Q. Do you know where the company is
03:36:46 16 located, the landfill company, the company that
03:36:48 17 transported the ART stems?

03:36:52 18 A. You've asked me two questions.

03:36:54 19 Q. Okay. You're absolutely right. My
03:36:56 20 understanding was that the company that
03:37:02 21 transported the -- Shoosmith Brothers, is it? Do
03:37:04 22 I have their name right? What's the name of the
03:37:06 23 company you told me on the landfill?

03:37:08 24 A. The landfill is Shoosmith Brothers.

03:37:12 25 Q. Did Shoosmith Brothers transport as

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well as accept materials in the landfill?

A. At Park 500 I don't believe Shoosmith Brothers was hauling material at that time.

Q. Do you know what company was hauling material at that time at Park 500?

A. I believe it was Waste Management of Virginia.

MR. NUNLEY: Mr. Killory, one point, for clarification. I think the record now would read as if the ART stems were handled separate and apart from the rest of the Park 500 waste. I don't know that that's accurate. You may want to ask the witness that, or you may be happy with the record as it is.

Q. Do you know whether, when the ART stems were put in a dumpster, whether they were in any way segregated from other waste materials from Park 500?

A. No, I do not.

Q. Do you know what the other waste materials would be from Park 500?

A. Paper, wood, plastic. Cafeteria waste. Bathroom waste.

Q. Would all ^{those} ~~these~~ materials be

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landfilled?

A. That's correct.

Q. Would the records reflecting the tipping fee and the hauling fee, that would be created -- would those be from Waste Management or from Shoosmith Brothers, the landfill owners?

MR. NUNLEY: Objection. Compound.

Q. You can answer, if you understand.

A. I'm not sure about the landfill tipping fee. The hauling fee would be Waste Management. What I can't tell you is, I don't know if Shoosmith billed directly or billed through Waste Management.

Q. But the hauling fee as I understand it is a per haul charge, not based on the weight of the materials; is that correct?

A. That's correct.

Q. It's only the tipping fee that reflects the weight of the materials being disposed of?

A. That's correct.

Q. And those would be created by Shoosmith, you don't know -- those would be created by Shoosmith Brothers?

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03:39:36 2 A. That's correct.

03:39:38 3 Q. But you don't know whether those
03:39:40 4 bills would have come through Waste Management or
03:39:42 5 billed directly by Shoosmith?

03:39:42 6 A. Correct.

03:39:46 7 Q. And you don't know to whom we should
03:39:48 8 talk to try to locate those records at Philip
03:39:48 9 Morris?

03:39:52 10 A. I don't specifically know, no.

03:40:00 11 Q. Do you know if there are records that
03:40:02 12 Philip Morris created reflecting the volume of
03:40:08 13 solubles generated by ART stems and disposed of
03:40:12 14 in the wastewater treatment facility at Park
03:40:12 15 500?

03:40:18 16 A. I don't remember specifically, no.

03:40:24 17 Q. Do you have any general recollection
03:40:24 18 of that?

03:40:26 19 A. In terms of the quantity generated?

03:40:26 20 Q. That's right.

03:40:28 21 A. No, I don't.

03:40:28 22 Q. Do you know whether records are
03:40:32 23 maintained of the quantity of materials processed
03:40:34 24 by the wastewater treatment facility?

03:40:38 25 A. Yes, they do.

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03:40:40 2 Q. Do you know who maintains those
03:40:42 3 records?

03:40:42 4 A. Not specifically, no.

03:40:42 5 Q. It's not your office?

03:40:44 6 A. No.

03:40:46 7 Q. Would it be individuals at Park 500?

03:40:46 8 A. Yes.

03:40:52 9 Q. Do you know what department would be
03:40:54 10 responsible for that at Park 500?

03:40:56 11 A. Gary Hill, I think, still has
03:40:58 12 responsibility for the wastewater treatment
03:41:02 13 plant.

03:41:08 14 Q. Is there any regulatory or other
03:41:10 15 requirement that requires records of the amount
03:41:12 16 disposed of in the wastewater treatment facility
03:41:14 17 to be maintained for a certain period of time?

03:41:16 18 A. Just read it back.

03:41:18 19 Q. Sure. Is there any regulation or
03:41:20 20 other requirement that requires Philip Morris to
03:41:26 21 retain the record, the records, of the volume of
03:41:28 22 waste -- of materials disposed of in the
03:41:32 23 wastewater treatment facility for any set period
03:41:32 24 of time?

03:41:34 25 MR. NUNLEY: Objection as to form.

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A. The permit is for the discharge of the material. The wash and the stems is something that the waste treatment gets on a regular basis, that type of material.

Q. The permit is for the discharge from wastewater treatment; is there anything in the permit that relates to the volume of materials that can be input into the wastewater treatment facility?

A. No. Not that I'm aware of.

Q. Do you know whether the ART stem solubles increased the volume of material discharge from the wastewater treatment facility?

A. No, I do not.

Q. Do you know whether those records are required, the records of the discharge as governed by the permit, whether the records of the volume of the discharge are required to be maintained for any period of time?

A. I'm not really sure.

Q. Would those records be kept by your office?

A. No, they would not.

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Q. Do you know who would keep the records of the discharge?

A. Again, Park 500.

Q. Would that be Gary Hill's operation again?

A. That's where I would start.

MR. NUNLEY: Mr. Killory, when you finish with your questioning about the volume issues, there's something I want to point out, but I won't do it until you finish your questioning.

MR. KILLORY: Okay.

(Merrill Exhibit 7 for identification, buck slip from Mickey Annamanthadoo, with attachments.)

MR. NUNLEY: I'll be happy to do it now, but I'll be happy to wait.

MR. KILLORY: It will just be a minute or two.

Q. Mr. Merrill, the court reporter has handed you a document, the first page of which is a buck slip from Mickey Annamanthadoo, PB 118472 is the first number, and the number on the last page, these were all attached in the production

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03:44:34 2 we received, PB 118488. Production number
03:44:42 3 2031410067, production number on the last page is
03:44:44 4 2031410083.
03:46:54 5 Have you had a chance to look at
03:46:56 6 Exhibit Number 7, Mr. Merrill?
03:46:58 7 A. Yes, I have.
03:47:00 8 Q. These materials behind the buck slip
03:47:04 9 are a facsimile transmission cover sheet from
03:47:08 10 Mickey Annamanthadoo ^{to} from you dated March 23rd,
03:47:10 11 1994. Do you recall seeing these materials
03:47:10 12 before?
03:47:14 13 A. Not specifically, no.
03:47:14 14 Q. How about generally?
03:47:16 15 A. Yes.
03:47:20 16 Q. Do you recall seeing them on March
03:47:22 17 23rd, 1994?
03:47:26 18 A. No, I do not.
03:47:28 19 Q. Do you know when you recall seeing
03:47:28 20 them?
03:47:32 21 A. Not specifically, no.
03:47:32 22 Q. How about generally?
03:47:38 23 A. This was the second day with the FDA,
03:47:42 24 and we went rather late. So I don't really
03:47:46 25 remember when I glanced at these and put these in

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03:47:46 2 the file.

03:47:48 3 Q. This was in response to your request
03:47:56 4 to gather materials after the FDA had inquired
03:47:58 5 about the ART stems; is that correct?

03:48:00 6 A. That's correct.

03:48:04 7 Q. The fax cover sheet says, "Additional
03:48:06 8 ART info." Do you recall whether there were more
03:48:10 9 than one transmission of information to you?

03:48:12 10 A. The "additional" refers to what I
03:48:16 11 picked up that morning at Park 500.

03:48:20 12 Q. And what information was that? A
03:48:22 13 prior fax that you had picked up, or --

03:48:22 14 A. No.

03:48:24 15 Q. Oh, I'm sorry.

03:48:26 16 A. It was what you based -- some of what
03:48:26 17 you handed out here.

03:48:28 18 Q. The material you were describing
03:48:30 19 before? Okay. From whom did you get that
03:48:34 20 material, the earlier material describing the ART
03:48:34 21 stems?

03:48:34 22 MR. NUNLEY: You mean Merrill Exhibit
03:48:34 23 4?

03:48:36 24 MR. KILLORY: That's right.

03:48:36 25 Q. The portions of Merrill Exhibit 4

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03:48:38 2 that you recall seeing.

03:48:42 3 A. Mickey Annamanthadoo and myself
03:48:46 4 obtained those from Bill Estes's files.

03:48:48 5 Q. But you had no discussions with
03:48:50 6 Mr. Estes at that time?

03:48:50 7 A. That's correct.

03:48:58 8 Q. Was there any reason other than the
03:49:02 9 FDA tour that prompted your collection of ART
03:49:06 10 stem materials?

03:49:06 11 A. No, there was not.

03:49:18 12 Q. If you could turn to PB 118475, it
03:49:18 13 would be the fourth page of Merrill Exhibit 7.
03:49:26 14 On the process objectives at the top of the page,
03:49:30 15 under "Speichim dewatering screen trials," item 2
03:49:32 16 says "Stems for landfill to be greater than 20
03:49:34 17 percent total solids."

03:49:36 18 Do you know what that means?

03:49:36 19 A. Yes, I do.

03:49:38 20 Q. What does that mean?

03:49:40 21 A. You're not allowed to put any
03:49:46 22 material in a landfill that contains more than 80
03:49:48 23 percent water.

03:49:52 24 Q. Do you know whether that was a
03:49:58 25 problem with the ART stem production, getting --

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satisfying that requirement?

A. No, I do not.

Q. Do you know what a TME is in the context of Park 500 production?

A. No, I don't.

Q. Or TME shower?

A. No, I don't have any recollection of what that might be.

Q. Could you turn to PB 118485, please.

(Witness complies.)

Q. It's towards the back of Merrill Exhibit 7. It's the fourth page from the end. It's entitled "Blending attendant log sheet."

Have you had a chance to look at that page?

A. Yes, I have.

Q. This is one of the pages sent to you in response to your ART stem inquiry, and it's "Blending attendant log sheet for ART stem processing."

Do you understand what this blank sheet reflects?

A. No, I do not, in total.

Q. Do you understand what any of it

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2 means, the categories?
3 A. Some.
4 Q. Which categories do you understand?
5 A. Date; a weigh belt reading.
6 Q. What is the weigh belt reading?
7 A. You measure the amount of material
8 delivered. It passes over a weigh belt, and the
9 weigh belt counts how much material passed over
10 it. Number 5 stem feeder, number 2 pulper.
11 Weigh belt PV, I do not know what that is.
12 Q. PV, you don't understand what that
13 is?
14 A. I don't know what PV is. Dilution
15 flow, I mean, I know what dilution flow is, and
16 in this case I would have to presume its specific
17 application. Pulper solubles, I know what that
18 is. Pulper level, I know what that is.
19 Q. What is dilution flow?
20 MR. NUNLEY: I thought he said he
21 would have to presume.
22 Q. You have a general knowledge as to
23 dilution flow, and you said you would have to
24 presume it applies here. What is your general
25 understanding of dilution flow, the meaning of

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it?

A. I mean, my general knowledge of dilution is to add something to reduce --

Q. Does the term "dilution flow" have any meaning to you, though?

A. Not specifically, no.

Q. You said you understood pulper solubles. In this context what would "pulper solubles" mean?

A. That would be the solubles in the liquid portion of the pulper.

Q. And the pulper level?

A. What level the solids and liquids were at in the pulper.

Q. Literally a measurement, the marking point within the pulper that would take a measurement?

A. No, not literally. The pulper has a level control device, a diaphragm, if you will, and the control room that reads -- sends an electronic signal so if they record the pulper level, they're watching this electronic meter and reading the level off of that meter.

Q. A completed version of this would

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03:54:00 2 tell one what, would measure what? Do you know?

03:54:02 3 A. No, I really don't.

03:54:14 4 Q. It wouldn't tell you anything that
03:54:16 5 you know in terms of the quantity at some stage
03:54:16 6 of processing?

03:54:20 7 A. To the best of my knowledge, I have
03:54:24 8 not seen a form like this while I was at Park
03:54:24 9 500.

03:54:30 10 Q. Do you have any understanding as to
03:54:34 11 what this would reflect in terms of a
03:54:36 12 measurement?

03:54:36 13 A. No, I don't.

03:54:38 14 Q. Do you know whether there are
03:54:42 15 completed versions of this form someplace at
03:54:42 16 Philip Morris?

03:54:46 17 A. No, I don't know for sure.

03:54:56 18 Q. Do you know who would maintain the
03:54:58 19 record if they do exist?

03:55:02 20 A. No, I really don't.

03:55:04 21 Q. Do you have a belief as to whether
03:55:06 22 there are completed versions of this at Park
03:55:06 23 500?

03:55:08 24 A. I really don't know.

03:55:12 25 Q. Take a look at the next page, 118486,

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03:55:18 2 which is also a blank log sheet. This one is the
03:55:22 3 ART stem GL log sheet. Do you know what GL
03:55:22 4 stands for there?

03:55:24 5 A. No, I do not.

03:55:34 6 Q. Do you have any understanding as to
03:55:36 7 what measurements would be reflected by a
03:55:38 8 completed version of this log sheet?

03:55:44 9 A. No, I do not.

03:55:50 10 Q. Would it be possible to determine
03:55:56 11 volume of ART stem materials processed from a
03:56:00 12 completed version -- from completed versions of
03:56:00 13 these log sheets, do you know?

03:56:02 14 A. I really don't know.

03:56:16 15 MR. KILLORY: Chip, you said you had
03:56:18 16 something you wanted to say about volume.

03:56:18 17 MR. NUNLEY: Ted, you asked some
03:56:24 18 questions about wastewater capacity, the '90-91
03:56:30 19 or '91-92 time frame. I just direct your
03:56:36 20 attention to Merrill number 4, 2030020674.

03:56:44 21 It's a memo dated 12/⁰⁴~~14~~/91. On the
03:56:48 22 second page it says "per Gary Hill," who I think
03:56:50 23 has been identified as head of wastewater
03:56:52 24 treatment, "wastewater treatment would be able to
03:56:54 25 handle an increased inflow of up to 25 gallons

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03:56:56 2 per minute."

03:57:00 3 Q. On the subject of volume, am I
03:57:02 4 correct that your earlier testimony was that you
03:57:12 5 are not aware of a total volume of ART stems
03:57:16 6 disposed of?

03:57:16 7 A. That's correct.

03:57:20 8 Q. And the only volume figure that
03:57:24 9 you're aware of was 600,000 pounds?

03:57:26 10 A. 600 plus.

03:57:28 11 Q. Approximately 600,000 pounds.

03:57:28 12 A. Yes.

03:57:30 13 Q. You don't recall the context in which
03:57:34 14 you heard that 600,000 figure; is that correct?

03:57:34 15 A. That's correct.

03:57:36 16 Q. But you're not aware of any other
03:57:40 17 volume, either by weight or literally by volume
03:57:44 18 figure associated with ART stem disposal
03:57:46 19 process?

03:57:46 20 A. No, I'm not.

03:58:28 21 MR. KILLORY: I'm going to move on to
03:58:30 22 another subject. Do you want to take a
03:58:32 23 two-minute break or continue?

03:58:34 24 THE WITNESS: Let's take a couple
03:58:34 25 minute break.

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03:58:36 2 THE VIDEO OPERATOR: We're going off
03:58:40 3 the record. The time on the screen is 3:58:39.

03:58:40 4 (A recess was taken.)

04:05:48 5 THE VIDEO OPERATOR: We're back on
04:05:52 6 the record. The time on the screen is 4:05:50.

04:05:56 7 MR. KILLORY: Looking at my screen, I
04:06:00 8 take it one of the last lines by the witness was
04:06:02 9 "Let's take a five-minute break," not "a dumb
04:06:02 10 minute break."

04:06:08 11 Q. Mr. Merrill, do you know whether you
04:06:10 12 signed a confidentiality agreement when you came
04:06:12 13 to work for Philip Morris?

04:06:18 14 A. When I first came to work for Philip
04:06:20 15 Morris, I don't remember exactly.

04:06:20 16 Q. Do you remember whether you have
04:06:22 17 signed a confidentiality agreement at any time in
04:06:24 18 the course of your employment with Philip
04:06:24 19 Morris?

04:06:26 20 A. Yes, I have.

04:06:28 21 Q. Do you know when you signed that?

04:06:34 22 A. Not specifically, no.

04:06:38 23 Q. Within the last few years?

04:06:42 24 A. The closest I can come for you is
04:06:42 25 within the last ten.

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Q. Was it part of a larger contract of employment?

A. As I recall, the one that I vividly remember signing, it was a broad passthrough to the company. Many people signed ~~it~~ them

Q. A broad passthrough to the company, I don't understand.

A. In other words, like the early retirement, many people did it at one time, many people were signing confidentiality agreements. I don't remember the circumstances.

Q. To the best of your recollection it was a separate document from an individual employment agreement -- I'm sorry. Do you have an individual employment agreement with the company?

A. Not that I'm aware of.

Q. So the confidentiality agreement is a standalone document apart from a larger employment agreement, as far as you know?

A. As far as I know, that's correct.

Q. Do you know the terms of the confidentiality agreement?

A. It seems to me that the terms that I

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remember were specific around the fact that I could not go to work for another tobacco company for a period of time once I left Philip Morris.

Q. Was there some precipitating event at the time that this sort of passthrough -- this broad signing of the documents, was there some precipitating event for that?

A. I'm not really aware if there was one or not.

Q. You mentioned earlier that at the time you were asked to participate in the FDA tour back in March, March 21 -- on the afternoon of March 21 you were asked to participate in the FDA tour.

You mentioned in your testimony this morning that that meant you were not returning to New York to work on the seven-minute -- ultimately what became the seven-minute tape; is that correct?

A. That's correct.

Q. And that tape was intended for what purpose?

A. That was the videotape that was handed out when Philip Morris announced filing

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04:09:10 2 suit against ABC.
04:09:14 3 Q. And what was the subject matter of
04:09:14 4 the tape?
04:09:18 5 A. The subject matter of the tape was
04:09:22 6 how cigarettes are made.
04:09:26 7 Q. With whom did you participate in the
04:09:26 8 creation of that tape?
04:09:38 9 A. People from Reuter's Television, and
04:09:40 10 as far as I know all of the folks were from
04:09:42 11 Reuter's Television.
04:09:44 12 Q. Anybody else from Philip Morris?
0 09:46 13 A. No.
04:09:50 14 Q. Is Reuter's Television to your
04:09:52 15 knowledge affiliated with Reuter's, the wire
04:09:54 16 service?
04:09:54 17 A. That's correct.
04:09:56 18 Q. Is it the same company?
04:09:58 19 A. That I can't tell you. I don't
04:09:58 20 know.
04:10:02 21 Q. Do you know when they were first
04:10:04 22 retained by Philip Morris?
04:10:06 23 A. No, I do not.
04:10:06 24 Q. Do you know when they were first
0 10:12 25 retained in connection with the project, this

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tape?

A. No, I do not.

MR. KILLORY: Mark that as Merrill
number 8.

(Merrill Exhibit 8 for
identification, How Cigarettes Are Made, Eighth
Draft.)

Q. Mr. Merrill, before you take a look
at number 8, before I identify it for the record,
let me ask you one other question. Who asked you
to participate in the creation of the "How
Cigarettes Are Made" tape, the seven-minute tape
we've been discussing?

A. Harold Burnley.

Q. When did he ask you to participate in
that project?

A. I believe it was Friday evening.

Q. The preceding Friday before the
21st?

A. That's correct.

Q. It would be the 18th of March?

A. That's correct.

Q. And what did he say to you in that
conversation?

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A. Basically he called me, and since the two of us had been together, he had items he was working on and would not be available to go to New York, would I be able to go to New York. And I told him yes.

Q. Was that your first knowledge of the project to create the tape?

A. I'm not sure if that was my first knowledge or not.

Q. But had you worked on it prior to that request by Mr. Burnley?

A. No, I had not.

Q. Could you take a look, please, at Merrill Exhibit Number 8, which is a document bearing the Bates stamp number on the first page of PB 114261, last page PB 114267. The corresponding production number is 2022997718 through 2022997724. The facsimile cover sheet with ^{some} attached pages.

Have you had a chance to look at Exhibit Number 8, Mr. Merrill?

A. Yes, I have.

Q. Do you recognize Exhibit Number 8?

A. Yes, I do.

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04:13:54 Q. What is it?

04:14:00 A. This is the script for the voiceover
04:14:04 of the seven plus minute tape entitled "How
04:14:06 Cigarettes Are Made."

04:14:06 Q. Do you know who prepared this
04:14:14 script? I should note it shows "Eighth draft" on
04:14:14 the cover page.

04:14:18 A. That's correct.

04:14:24 Q. Let me ask you a different question.
04:14:28 Had you seen preceding drafts of this document?

04:14:32 A. I don't know how many of the drafts I
04:14:34 saw. I did not see all of them, that I
04:14:34 remember.

04:14:40 Q. Do you know who prepared this draft?

04:14:44 A. This specific draft, no, I do not.

04:14:52 Q. Who is Frank Naylor?

04:14:54 A. Frank Daylor?

04:14:56 Q. Daylor, I'm sorry.

04:14:58 A. Works at R&D, or did. Frank is
04:15:00 retired also.

04:15:04 Q. Jim Charles worked at R&D ~~also~~,
04:15:04 correct?

04:15:04 A. Retired.

04:15:08 Q. Do you know who Tony Andrade is?

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04:15:08 2 A. Yes.

04:15:10 3 Q. Who is he?

04:15:16 4 A. Tony is a lawyer in New York, New
04:15:18 5 York offices.

04:15:20 6 Q. Did you work with these individuals
04:15:28 7 in the preparation of the seven-minute tape?

04:15:36 8 A. The only one -- I didn't really work
04:15:40 9 with any of the three. And the only person that
04:15:42 10 I had any contact with of the three was Jim
04:15:44 11 Charles, and that was approximately a two-minute
04:15:44 12 phone call.

04:15:52 13 Q. And what was said in that phone
04:15:54 14 call? Did you call Mr. Charles?

04:15:56 15 A. No, I did not.

04:15:56 16 Q. He called you?

04:15:56 17 A. That's correct.

04:16:02 18 Q. Do you know when that phone call took
04:16:02 19 place?

04:16:02 20 A. Not specifically, no.

04:16:02 21 Q. In relation to when you were first
04:16:06 22 asked by Mr. Burnley on the 18th of March to help
04:16:10 23 out on this project, do you know when in relation
04:16:12 24 to that event Mr. Charles called you?

04:16:14 25 A. I don't remember whether it was

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Sunday, Monday, Tuesday, or Wednesday.

Q. Do you remember when the final tape was distributed?

A. Not specifically, no.

Q. It was distributed at the press conference announcing the commencement of the lawsuit against ABC; is that correct?

A. That's correct.

Q. Could you turn to what's the second page of Exhibit 8, the first page of text of this eighth draft.

(Witness complies.)

Q. On the third paragraph down, it says -- the second sentence says, "During the aging process the crop is evaluated to determine its characteristics for the purpose" --

A. I'm sorry. I must be on the wrong page.

Q. On the first page of text, the third paragraph down.

A. Right.

Q. Second sentence.

A. Mm-hmm. Oh, I'm sorry. Okay.

Q. "During the aging process the crop is

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evaluated to determine its characteristics for
the purpose of blending."

Do you have an understanding as to
what that means?

MR. NUNLEY: Well, I think you can
ask him for his understanding. Asking him what
this means calls for speculation.

Q. Let me ask you a preliminary
question. Do you know whether you had any input
in that sentence, the drafting of that sentence?

A. I'm not sure.

Q. Do you have an understanding of that
sentence?

MR. NUNLEY: Same objection.

A. I don't have a specific understanding
of the sentence as it is in total.

Q. Now I don't understand. It's only
fair.

A. Fair.

Q. What do you mean by that?

A. During the aging process the crop is
evaluated to determine its characteristics for
the purpose of blending. I know of samples being
taken to measure reducing sugars.

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04:18:38 2 Q. Do you know of any other
04:18:40 3 measurements?

04:18:40 4 A. No, I do not.

04:18:42 5 Q. Any measurements of alkaloids?

04:18:44 6 A. No, I do not.

04:19:18 7 MR. KILLORY: Would you mark that as
04:19:20 8 9, please.

9 (Merrill Exhibit 9 for
10 identification, How Cigarettes Are Made.)

04:19:46 11 Q. Keep Exhibit 8 handy, Mr. Merrill.
04:19:48 12 But if you can take a look at what's just been
04:19:52 13 handed to you as Exhibit Number 9. It's Bates
04:20:00 14 stamped PA 100481 through 483, corresponding
04:20:04 15 production numbers of 20223913620 through
04:20:06 16 2023913622.

04:20:36 17 MR. BHATIA: Ted, the text on the
04:20:40 18 document on the last page is cut off a little
04:20:44 19 bit. Is it that way on the copy that was
04:20:44 20 marked?

04:20:44 21 MR. KILLORY: My understanding is the
04:20:46 22 copy that was received was like that. I can't
04:20:48 23 say for sure, but when I asked the people
04:20:50 24 processing documents, I was told that's what it
04:20:50 25 was.

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04:21:28 2 Q. Have you had a chance to look at
04:21:28 3 Exhibit Number 8?

04:21:30 4 MR. NUNLEY: 8 or 9?

04:21:32 5 MR. KILLORY: Is that 9? I'm sorry.

04:21:32 6 Q. Exhibit Number 9.

04:21:34 7 A. Yes, I have.

04:21:36 8 Q. Do you recognize that document?

04:21:36 9 A. Not specifically, no.

04:21:40 10 Q. It is similar in text to Exhibit
04:21:44 11 Number 8, is it not?

04:21:46 12 MR. NUNLEY: Objection as to form.

04:21:48 13 A. I haven't read it word for word but
04:21:50 14 it appears to be similar, yes.

04:21:52 15 Q. Do you know whether this is a
04:21:58 16 subsequent draft of Exhibit Number 8?

04:21:58 17 A. I have no idea.

04:22:12 18 Q. Did you narrate the tape that was
04:22:14 19 distributed at the press conference?

04:22:16 20 A. No, I did not.

04:22:16 21 Q. Who did?

04:22:20 22 A. I'm not sure what the fellow's name
04:22:24 23 was. As a matter of fact if it wasn't on the
04:22:26 24 front of the page, I probably wouldn't be able to
04:22:30 25 remember anybody's name. But Betsy Rich was one

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of the folks that was working on the script.

Q. In addition to your call with Mr. Charles, what input did you have in the project?

A. We sat and put together the script for the voiceover.

Q. And the individuals you sat and worked with on that were which individuals?

A. Some of them were from Reuter's. I'm not sure if all of them were or not.

Q. Betsy Rich?

A. Betsy was one.

Q. And some of her colleagues?

A. Mm-hmm.

Q. And Mr. Andrade?

A. No one else from Philip Morris was there.

Q. I may well be repeating, I don't recall. What was the substance of your conversation with Mr. Charles that you testified to?

A. I believe the subject matter of my conversation with Dr. Charles was around what percent contribution of nicotine did the SDA 4

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04:23:58 2 have.

04:24:02 3 Q. And what do you mean by SDA 4?

04:24:08 4 A. SDA 4 is the denatured ethyl alcohol
04:24:12 5 that's used in the aftercut flavors.

04:24:24 6 Q. Was Dr. Charles asking you that or
04:24:24 7 were you asking him?

04:24:34 8 A. I'm not sure who asked who what.

04:24:38 9 Q. ^{at that time} Did either of you know the answer to
04:24:38 10 that question ~~at that time?~~

04:24:40 11 A. Yes, Dr. Charles did.

04:24:40 12 Q. And what did he say?

04:24:44 13 A. As I recall, it resulted in a number
04:24:48 14 that would be approximately one one thousandth of
04:24:50 15 1 percent.

04:24:54 16 Q. In the course of your participation
04:25:00 17 with Reuter's in preparing the script for the
04:25:06 18 seven-minute tape, did you make corrections on
04:25:12 19 drafts, preexisting drafts before you had joined
04:25:12 20 the project?

04:25:20 21 A. We or I started the process with the
04:25:22 22 folks from Reuter's. I don't know how many
04:25:28 23 drafts we created; one, two, on that Sunday
04:25:38 24 afternoon and evening. And I had input on those
04:25:38 25 areas that I had knowledge of.

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04:25:44 2 Q. I want to make sure the record is
04:25:46 3 clear. When you first began to ~~participate on~~ ^{participating in}
04:25:50 4 this project, you participated in preparing along
04:25:52 5 with others the first draft of the script?

04:25:54 6 A. That's correct.

04:26:02 7 Q. Was Betsy Rich and you preparing the
04:26:04 8 first draft or was that you alone?

04:26:06 9 A. That was with the whole group.

04:26:12 10 Q. The entire group? And I believe you
04:26:14 11 testified before, you don't know whether you saw
04:26:18 12 all subsequent drafts of that script; correct?

04:26:20 13 A. That's correct.

04:26:22 14 Q. Did you see the final of that
04:26:22 15 script?

04:26:26 16 A. I don't believe I did.

04:26:30 17 Q. So it's possible that subsequent
04:26:32 18 edits were made, subsequent to your last
04:26:36 19 participation in the project before the tape was
04:26:36 20 made?

04:26:36 21 A. Yes.

04:26:40 22 Q. Do you know if that's in fact the
04:26:40 23 case?

04:26:40 24 A. Yes, I do.

04:26:42 25 Q. Do you know what the changes were

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2 after your participation in the final project --
3 product?

04:26:48 4 A. Not specifically, no.

04:26:52 5 Q. Do you know generally?

04:26:56 6 A. Some of what you have given me in
04:27:02 7 Exhibit Number 8 I recognize as things that we
04:27:10 8 wrote down and discussed on Sunday, the 20th.
04:27:14 9 And some of the items on Exhibit 8 I don't
04:27:14 10 remember.

04:27:34 11 Q. If you look on Exhibit Number 8, page
04:27:44 12 2, the first paragraph begins a description of
04:27:46 13 the RL process. Take a look at that paragraph,
27:46 14 please.

04:27:48 15 (Witness complies.)

04:29:10 16 Q. Have you had a chance to look at that
04:29:10 17 paragraph?

04:29:12 18 A. Yes, I have.

04:29:14 19 Q. Is there anything in that paragraph
04:29:14 20 that's incorrect?

04:29:16 21 MR. NUNLEY: Objection as to form.

04:29:40 22 A. Not that I can see.

04:29:46 23 Q. You said earlier that you had
04:29:50 24 input -- you can recall looking at Exhibit 8, ^{that} ~~but~~
04:29:52 25 you had input on some of the items on the

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04:29:56 2 exhibit. Can you take me through and identify
04:29:58 3 which portions you can recall having input on?

04:30:02 4 A. I'm not sure that I can adequately do
04:30:06 5 that. Some pieces look very familiar as to what
04:30:10 6 we discussed, and for all I know right here and
04:30:12 7 now, one or two words could be changed and I
04:30:14 8 wouldn't know it necessarily.

04:30:16 9 Q. Are there portions of Exhibit 8 that
04:30:20 10 you clearly understand not to be something that
04:30:24 11 you saw at the time or discussed? Let me
04:30:28 12 rephrase that. Are there any portions of Exhibit
04:30:32 13 8 that you clearly understand were not items that
04:30:32 14 you discussed?

04:30:48 15 A. Items, specific areas, no, I think we
04:30:48 16 discussed all of ~~those~~ ^{these} areas.

04:30:48 17 MR. NUNLEY: I think, Mr. Merrill,
04:30:52 18 he's asking about the entire document. Is that
04:30:54 19 right, Mr. Killory?

04:30:54 20 MR. KILLORY: That's right, I've
04:30:56 21 expanded to the entire document. ~~Did~~ WITNESS: Oh, I'm sorry.

04:30:58 22 Q. You ^{mentioned} ~~recognized~~ in your ^{prior} testimony that
04:31:00 23 you recognized certain portions. And you just
04:31:02 24 testified you're not sure you can specifically
04:31:06 25 say which portions you discussed, with certainty,

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item by item.

My question ^{was} ~~is~~, are there any items, throughout Exhibit 8 are there any items there that you specifically recall not discussing?

MR. NUNLEY: Objection as to form.

A. We've got two things here.

Q. Okay.

A. The individual areas were all discussed.

Q. Individual areas, now we're referring to all of Exhibit 8?

A. As far as I can tell from this document, all the areas were discussed. However, I cannot tell you that what shows up in draft 8 is something I specifically addressed and had the words put in this document.

Q. I understand. We can put those aside for the moment.

Did you assist in any way in the preparation for the testimony of Mr. Campbell, Ms. Ellis, or the appearance of Mr. Campbell and Ms. Ellis and Mr. Burnley before the congressional committee?

MR. NUNLEY: Objection. Compound.

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04:32:34 2 Q. You can answer.

04:32:36 3 A. I had absolutely nothing to do with
04:32:38 4 any of that.

04:32:52 5 Q. Were you involved --

04:32:52 6 MR. KILLORY: Would you mark that as
04:32:54 7 Exhibit Number 10, please.

8 (Merrill Exhibit 10 for
9 identification, Philip Morris statement of
10 nicotine in cigarettes.)

04:34:42 11 Q. Have you had a chance to look at
04:34:44 12 Exhibit Number 10, Mr. Merrill?

0 34:46 13 A. Yes, I have.

04:34:48 14 Q. Do you recognize the statement on
04:34:50 15 nicotine set forth -- I'm sorry, I did not
04:34:52 16 identify Exhibit Number 10 for the record. It's
04:34:54 17 ~~PA~~ 421558 through 559, with corresponding
04:35:00 18 production numbers of 2023323749 through 50.

04:35:10 19 Do you recognize Exhibit Number 10?

04:35:10 20 A. I don't have a recollection
04:35:12 21 specifically of this document, no.

04:35:14 22 Q. My understanding is it was produced
04:35:16 23 by Philip Morris, that it was a statement that
04:35:18 24 Philip Morris submitted to Congress on or about
0 35:22 25 March 25th, 1994. Does that refresh your

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2 recollection at all as to the document?

04:35:24 2
04:35:28 3 A. I'm not sure I saw this document at
04:35:28 4 all.

04:35:34 5 Q. Did you have any role in the drafting
04:35:34 6 of this document?

04:35:36 7 A. Not that I'm aware of.

04:35:42 8 Q. Is it possible that you could have
04:35:44 9 had a role in drafting it but not been aware of
04:35:46 10 that fact?

04:35:52 11 A. Someone could have called and asked
04:35:52 12 me a specific question and not relate to me what
04:35:54 13 it was about, and then it could have been part of
04:35:54 14 this. I have no knowledge of that.

04:35:58 15 Q. Do you recall receiving any phone
04:36:02 16 calls around this time, around the late March
04:36:08 17 1994 time period, requests for information on the
04:36:12 18 subject, subjects described in Exhibit Number
04:36:12 19 10?

04:36:14 20 A. No, I do not.

04:36:20 21 Q. Did you have any conversations with
04:36:24 22 Mr. Burnley regarding the testimony, the
04:36:28 23 appearance of Mr. Burnley and Mr. Campbell and
04:36:30 24 Ms. Ellis before the Waxman committee?

04:36:36 25 A. You'll have to be more specific to

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2 the time frame.

3 Q. Okay. Before Mr. Burnley appeared
4 along with Mr. Campbell and Ms. Ellis before the
5 Waxman committee, did you have any conversations
6 with him, Mr. Burnley, on the subject of his
7 prospective appearance?

8 A. No, I did not.

9 Q. Subsequent to Mr. Burnley's,
10 Mr. Campbell's, Ms. Ellis's appearance before the
11 Waxman committee, did you have any conversations
12 with Mr. Burnley about that appearance?

13 MR. NUNLEY: To the extent those
14 conversations took place after March 24, 1994, I
15 object as irrelevant and also as violative of the
16 Court's protective order.

17 Q. Did you have any such conversation?

18 A. Some, yes.

19 Q. When did those occur?

20 A. Sometime after the Waxman hearings.

21 Q. Do you know for certain when after
22 the Waxman hearings?

23 A. No, I really don't.

24 Q. With whom did you have such
25 discussions?

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A. Harold Burnley.

DIR Q. What did you say to Mr. Burnley?

MR. NUNLEY: Mr. Killory, I'll remind you again, I think the Waxman hearings were on or after March 24, '94. You're shaking your head. I don't know if that means you don't care about the protective order, you don't care about the orders entered by the Court in this case.

But the judge has constrained discovery to ~~before~~ March 24, '94. We've been through this before in earlier depositions. I've told you I don't like to direct witnesses not to answer.

But I've ^{also} ~~already~~ told you that when a lawyer proceeds to ask questions in areas that have been expressly carved out by the Court, I don't have any choice but to do so.

MR. KILLORY: ^{A difference of view} I obviously am not ignoring the Court's order. We have a difference of view as to the applicability of the Court's order here. I asked a simple question, but if you want to instruct, that's fine.

MR. NUNLEY: I don't think you've established when the conversation is. I think on

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04:38:42 2 the record it clearly took place well after the
04:38:44 3 lawsuit was filed.

04:38:48 4 MR. KILLORY: Are you going to
04:38:48 5 instruct not to answer that question on that
04:38:50 6 basis, the pending question?

04:38:52 7 MR. NUNLEY: How is it we have a
04:38:54 8 disagreement as to the applicability of the
04:38:56 9 Court's rulings?

04:38:58 10 MR. KILLORY: I don't want to get
04:39:00 11 into a debate with you here.

04:39:00 12 MR. NUNLEY: I'm just asking for your
04:39:00 13 position.

04:39:02 14 MR. KILLORY: This question, as to
04:39:04 15 this subject matter, as to the testimony on
04:39:06 16 nicotine before the Waxman committee, I don't
04:39:08 17 believe your position is correct. But I may be
04:39:08 18 wrong.

04:39:10 19 MR. NUNLEY: Then what is your
04:39:10 20 position?

04:39:12 21 MR. KILLORY: My position is that
04:39:14 22 this question as to the testimony that's -- the
04:39:16 23 preparation of documents and the testimony and
04:39:18 24 any subsequent conversations about that
04:39:22 25 preparation for testimony and testimony is within

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04:39:24 2 permissible discovery in this case.

04:39:26 3 If you want to instruct, that's
04:39:26 4 fine. I don't want to get into a full fledged
04:39:28 5 debate.

04:39:28 6 MR. NUNLEY: I don't want to get a
04:39:32 7 debate. All I want to know is the basis that you
04:39:34 8 believe that testimony about events that occurred
04:39:38 9 after the discovery cutoff is called for.

04:39:40 10 MR. KILLORY: We've each stated our
04:39:40 11 respective views.

04:39:42 12 MR. NUNLEY: If you're not going to
04:39:44 13 tell me why, then I am going to instruct him not
04:39:46 14 to answer.

04:39:46 15 Q. Do you accept your counsel's
04:39:48 16 instruction?

04:39:48 17 A. Yes, I do.

04:40:20 18 Q. On Exhibit Number 10, Mr. Merrill, if
04:40:26 19 you could look at page 421559, which is the
04:40:36 20 second page, the second paragraph discusses the
04:40:38 21 number of flavorings sprayed onto tobacco in the
04:40:42 22 manufacture of cigarettes. One of these
04:40:44 23 flavorings is commonly referred to as tobacco
04:40:46 24 extract. Tobacco extract appears as only one
04:40:48 25 component of a flavoring package.

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04:40:54 2 It continues to say, "The nicotine
04:40:56 3 contribution from tobacco extracts added to the
04:40:58 4 finished products is negligible and does not ^{Measurably}
04:41:02 5 change the levels of nicotine in tobacco smoke.
04:41:04 6 Philip Morris no longer uses tobacco extracts in
04:41:08 7 any of its ^{brands} ~~products~~ (the fact that cigarette
04:41:10 8 companies have used tobacco as a flavoring agent
04:41:14 9 has long been a matter of public record)."

04:41:16 10 Do you know at what points Philip
04:41:20 11 Morris sprayed tobacco extracts onto tobacco?

04:41:20 12 A. No, I do not.

04:41:42 13 Q. Are you aware that ABC made inquiries
04:41:46 14 of Philip Morris in advance of the broadcast of
04:41:48 15 the Day One story?

04:41:50 16 A. Yes.

04:41:52 17 Q. When did you first become aware of
04:41:54 18 that fact?

04:41:58 19 A. On Monday, February 28th.

04:42:00 20 Q. What was the context in which you
04:42:00 21 became aware of that fact?

04:42:06 22 A. The Day One program.

04:42:06 23 Q. Watching the program as it was
04:42:08 24 broadcast?

04:42:08 25 A. That's correct.

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04:42:12 2 Q. Before you watched the program, did
04:42:14 3 you have any knowledge of any inquiries by ABC
04:42:18 4 made to Philip Morris?

04:42:20 5 A. Not that I'm aware of, no.

04:42:26 6 Q. You were never consulted by anyone
04:42:30 7 with regard to fashioning a possible response to
04:42:34 8 any inquiries by ABC before the broadcast?

04:42:34 9 A. That's correct.

04:42:48 10 Q. Do you know who Victor Han is?

04:42:48 11 A. Yes, I do.

04:42:50 12 Q. Do you recall having any
04:42:54 13 conversations with him before the broadcast about
04:42:56 14 ABC inquiries?

04:43:00 15 A. No, I did not.

04:43:14 16 Q. Were you, prior to your consultations
04:43:16 17 with counsel and in preparation for this
04:43:20 18 deposition, were you consulted in connection with
04:43:24 19 the preparation of interrogatory responses by
04:43:26 20 Philip Morris?

04:43:28 21 MR. NUNLEY: In this case?

04:43:30 22 MR. KILLORY: In this case.

04:43:30 23 A. Some of them, yes.

04:43:32 24 Q. Do you recall which ones?

04:43:38 25 A. Not exactly, no.

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04:43:40 2 Q. Do you recall the subject matter of
04:43:42 3 the interrogatories that you were consulted
04:43:44 4 about?

04:43:48 5 A. There was one set of interrogatories
04:43:52 6 that I reviewed. I can't tell you specifically
04:43:54 7 which one it was.

04:44:06 8 Q. Did you -- strike that. Had you been
04:44:10 9 requested at any time to search your files for
04:44:12 10 ~~any~~ documents responsive to ABC's document
04:44:14 11 request in ^{the course of} discovery orders in this case?

04:44:16 12 A. Yes, I was.

04:44:16 13 Q. When was the first time you recall
04:44:18 14 being asked to search your files?

04:44:26 15 A. I don't remember the exact date.

04:44:30 16 Q. Do you maintain your files in your
04:44:30 17 office?

04:44:32 18 A. Yes, I do.

04:44:34 19 Q. Do you have a secretary who also
04:44:36 20 maintains files for you?

04:44:36 21 A. Yes, I do.

04:44:38 22 Q. Did you conduct a search of the
04:44:40 23 files?

04:44:40 24 A. Yes, I did.

04:44:52 25 Q. Yesterday evening I received by fax

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04:44:56 2 ~~In~~^{and} hard copy, ~~it~~ was delivered to McGuire Woods
04:44:58 3 here, some additional documents which I believe
04:45:02 4 came from your files. Do you know when you first
04:45:06 5 discovered those documents?

04:45:08 6 MR. NUNLEY: I don't know that he
04:45:08 7 knows which ones you're talking about.

04:45:10 8 Q. You don't know which documents I'm
04:45:14 9 referring to? Okay. Were you asked to do a
04:45:16 10 subsequent search of your files after the first
04:45:18 11 search that we were just discussing?

04:45:18 12 A. Yes, I was.

04:45:20 13 Q. When was that?

04:45:24 14 A. A week ago today.

04:45:30 15 Q. And did you locate additional
04:45:30 16 documents at that time?

04:45:32 17 A. No, I did not.

04:45:44 18 MR. KILLORY: Chip, this would
04:45:46 19 probably be as good a time to adjourn for today
04:45:48 20 as any.

04:45:50 21 MR. NUNLEY: There's no hope of
04:45:50 22 finishing today?

04:45:50 23 MR. KILLORY: No.

04:45:52 24 MR. NUNLEY: I think I had heard we
04:45:54 25 were going to go for half a day tomorrow; is that

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correct, or not?

MR. KILLORY: I hadn't heard that.

It's possible, but I had not heard that. I won't commit to that. I'll certainly try to expedite it as much as possible.

MR. NUNLEY: All right.

THE VIDEO OPERATOR: We're going off the record. The time on the screen is 4:46:09.

(Time noted: 4:46 p.m.)

David Ernest Merrill

DAVID ERNEST MERRILL

Subscribed and sworn to before me
this 26 day of January, 1996.

Linda C. Thornton
Richmond, Va.
Commission Exp. 2/28/97

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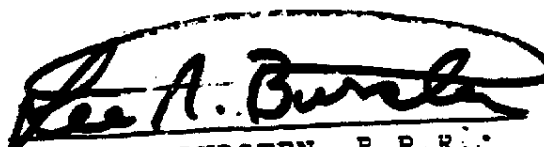
C E R T I F I C A T E

I, LEE A. BURSTEN, a Registered Professional Reporter and Notary Public within and for the Commonwealth of Virginia, do hereby certify:

That DAVID ERNEST MERRILL, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by the witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 14th day of July, 1995.


LEE A. BURSTEN, R.P.R.

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E X H I B I T S

DESCRIPTION	PAGE	LINE
(Merrill Exhibit 1 for identification, cover sheet on the stationery of Stephen Parrish dated March 21, 1994, to Ronald G. Chesemore, with attachments.)	64	8
(Merrill Exhibit 2 for identification, minutes of the R&D strategic planning committee meeting, April 28th, 1989.)	110	21
(Merrill Exhibit 3 for identification, interoffice correspondence from Mr. Hensley and Mr. Pate.)	120	24
(Merrill Exhibit 4 for identification, Project Name ART Stem Disposal.)	123	6
(Merrill Exhibit 5 for identification, November 15, 1988 memo from W.E. Poorbaugh to Mr. D.L. Milby.)	136	20
(Merrill Exhibit 6 for identification, August 8th, 1988 memo from J.N. Tenhet to J.D. Watkins.)	137	7
(Merrill Exhibit 7 for identification, buck slip from Mickey Annamanthadoo, with attachments.)	150	13

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E X H I B I T S

DESCRIPTION PAGE LINE

(Merrill Exhibit 8 for identification,
How Cigarettes Are Made, Eighth Draft.).. 164 5
(Merrill Exhibit 9 for identification,
How Cigarettes Are Made.)..... 170 8
(Merrill Exhibit 10 for identification,
Philip Morris statement of nicotine in
cigarettes.)..... 178 7

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Keyword: (INSERT
Not Found.

Keyword: DIR

[101,22] DIR Q. And what was that determination?
MR. NUNLEY: That determination was

[181,3] DIR Q. What did you say to Mr. Burnley?
MR. NUNLEY: Mr. Killory, I'll remind

Keyword: REQ
Not Found.

Keyword: RUL
Not Found.

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